Supreme Court, U.S.
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In The

Supreme Court of the United States

ROGER DRACH,

Petitioner,

v.

LOUIS BRUCE and THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of *Certiorari*
To The Supreme Court Of Kansas

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

I

Whether, in direct conflict with the published opinions of this Court in *Ohio v. Roberts*, 448 U.S. 56 (1980), *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999), the Supreme Court of Kansas erred in holding that the admission of hearsay testimony under Kansas's unique, judicially-created "marital discord" hearsay exception does not violate the Sixth Amendment to the Constitution of the United States.

II

Whether, in direct conflict with the holding of the United States Court of Appeals for the Ninth Circuit in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), the Supreme Court of Kansas erred in holding that the decision of this Court in *Crawford v. Washington*, 541 U.S. 36 (2004), regarding the admissibility of testimonial hearsay evidence under the Sixth Amendment, does not apply retroactively to cases on collateral review.

III

Whether the Supreme Court of Kansas's holding that *Crawford* does not apply retroactively to cases on collateral review violates the holdings of this Court in *Teague v. Lane*, 489 U.S. 288 (1989), and *Schriro v. Summerlin*, 542 U.S. 348 (2004).

LIST OF PARTIES

The parties to the proceedings below were Mr. Drach, the petitioner, and Louis Bruce, Warden of Hutchinson Correctional Facility, the prison where Mr. Drach currently is incarcerated, and the State of Kansas, respondents.

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PETITION FOR WRIT OF *CERTIORARI*

Petitioner Roger Drach respectfully prays that this Court issue a Writ of *Certiorari* to the Supreme Court of Kansas to review its judgment entered on June 9, 2006, and its subsequent denial of his Motion for Rehearing or Modification on September 19, 2006.

OPINIONS BELOW

This is a post-conviction remedy case. It was heard under Kansas Statutes Annotated (K.S.A.) Section 60-1507, in the District Court of Finney County, Kansas (Case Number 04-CV-152), and the Supreme Court of Kansas (Case Number 93,654). The opinion of the Supreme Court of Kansas is reported at 136 P.3d 390 (Appendix 1). The order denying the Petitioner's Motion for Rehearing or Modification is unreported (App. 65). The judgment of the District Court of Finney County, Kansas, is unreported (App. 36).

The underlying criminal prosecution was pursued in the District Court of Finney County, Kansas (Case Number 96-CR-421), and the judgment of conviction was affirmed upon direct appeal by the Supreme Court of Kansas, *State v. Drach*, 268 Kan. 636, 1 P.3d 864 (2000) (*Drach I*) (App. 42).

JURISDICTION

Judgment of the Supreme Court of Kansas was entered on June 9, 2006, and rehearing or modification was denied on September 19, 2006. This Court's jurisdiction to consider

this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

On October 31, 1997, Petitioner Roger Drach was convicted of the crimes of murder in the first degree in violation of K.S.A. § 21-3401, aggravated battery in violation of K.S.A. § 21-3414(a)(1)(a), and criminal use of weapons in violation of K.S.A. § 21-4201(a)(1). He was sentenced to a term of imprisonment of twenty-five years to life. He is 70 years old. Mr. Drach had been found guilty by a jury after his entry of a plea of not guilty.

The charges stemmed from the death of Mr. Drach's wife, Deanne Drach, on August 19, 1994, in the couple's home in Garden City, Kansas. Mrs. Drach died from a gunshot wound to her chest at contact range or near-contact range. At that time, authorities considered her death to be a suicide and continued to do so for two years. Mr. Drach's administration of his late wife's estate was disputed by his brother-in-law. Some of her relatives pursued litigation against Mr. Drach. Exactly two years

after her death, the prosecutor filed the criminal charges against Mr. Drach.

The prosecution's theory at trial was that Mr. Drach had murdered his wife. The defense was that Mrs. Drach had committed suicide. As there were no witnesses to Mrs. Drach's death and Mr. Drach was not allowed by his lawyers to testify on his own behalf, all of the evidence against Mr. Drach was circumstantial. The prosecution presented expert forensic witnesses who testified that Mrs. Drach's gunshot wound was inflicted by someone else. To show motive and intent, the prosecution presented expert witnesses who testified to the forensic and medical likelihood that Mrs. Drach earlier had been abused. The prosecution also presented witnesses who testified that they did not believe that Mrs. Drach had the propensity to commit suicide. On rebuttal, the prosecution produced a surprise witness, Mrs. Karen Althaus, who said that 25 years earlier Mr. Drach had threatened his wife's life after he discovered Mrs. Drach's extramarital affair with Mrs. Althaus's husband. Mr. Drach wanted to testify to rebut this, but his trial lawyers would not allow him to do so.

The defense rebutted the prosecution's forensic evidence with its own experts who demonstrated both that Mrs. Drach's wound was self-inflicted and that there was no forensic or medical probability of abuse. The defense produced witnesses who testified to the Drachs' good relationship and to Mr. Drach's good character. Witnesses testified that Mrs. Drach had attempted suicide in the past due to her severe alcoholism and depression following the deaths of her mother and her son less than a year before her own death. As well, the defense presented a note that Mrs. Drach had written and given to her husband immediately before her death. The note was read

into evidence by a detective on cross-examination. Its text is included in the opinion of the Supreme Court of the State of Kansas on direct appeal. *State v. Drach*, 268 Kan. 636, 641-642, 1 P.3d 864 (Kan. 2000). The defense sought to place on the stand Dr. Tim McBath, a board-certified psychiatrist, to give his opinion that the writing was a suicide note. The trial court, however, held that Dr. McBath was not qualified as an expert under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Crucial to the prosecution's case (and the focus of this petition) was the hearsay testimony of Lana Christensen, Carol Taylor, Janet Myers, Marvelle Darrough, Marvelle Sosa, and Dora Hermocillo, all of whom were volunteers or workers who had encountered Mrs. Drach when she sought treatment for her severe alcoholism, first at various women's crisis centers and then at a substance abuse recovery center in Wichita. They alleged that Mrs. Drach had told them her husband had abused her physically. They even alleged that Mrs. Drach had told them her husband had shot her in her shoulder at some time prior to 1994. Their conversations with Mrs. Drach occurred while they were attempting to convince her to divorce her husband and pursue legal action against him for the alleged abuse. Since Mrs. Drach was deceased, Mr. Drach was not able directly to rebut these hearsay assertions. This was the only evidence that tipped the scales in favor of the prosecution.

The defense objected to this testimony as being inadmissible hearsay in violation of Kansas law and the Sixth Amendment's Confrontation Clause. The trial court, however, overruled the defense's objection and held that the testimony was admissible as part of the *res gestae*. The defense continued its objection to the hearsay throughout

the two-week trial. The defense did, however, present evidence from Mrs. Drach's brother-in-law that contradicted the hearsay: he testified that Mrs. Drach told him she had lied to the aid workers in order to placate them.

The Supreme Court of Kansas reviewed Mr. Drach's conviction on direct appeal. Mr. Drach argued that the admission of the hearsay as part of a *res gestae* exception violated the Confrontation Clause under holdings of this Court. The Kansas court, however, affirmed Mr. Drach's conviction and sentence. It concluded that even if a sweeping *res gestae* hearsay exception violated the Confrontation Clause, the evidence nonetheless was admissible against Mr. Drach under Kansas's judicially-created "marital discord hearsay exception" (App. 63).

Upon exhaustion of his direct appeal, Mr. Drach filed a Motion Attacking Sentence pursuant to K.S.A. § 60-1507, Kansas's procedural vehicle for post-conviction state *habeas corpus* relief. Mr. Drach argued that the issuance of a writ of *habeas corpus* was necessary because his conviction was based largely on testimonial hearsay in violation of the Confrontation Clause, in that (1) the decision of this Court in *Crawford v. Washington*, 541 U.S. 36 (2004), was retroactive to his case on collateral appeal, requiring a retrial due to the improper admission of testimonial hearsay evidence, and (2) admission of the hearsay under the marital discord exception violated this Court's previous holding in *Ohio v. Roberts*, 448 U.S. 56 (1980), and this Court's subsequent interpretations of the *Roberts* doctrine in *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999). (He also raised other claims not germane here.)

On October 22, 2004, the District Court of Finney County, Kansas, denied Mr. Drach's motion (App. 41). The basis of the district court's decision was that *Crawford* is not retroactive in cases on collateral appeal and any discussion under *Roberts* was *res judicata*. The Supreme Court of Kansas reviewed the denial of Mr. Drach's § 60-1507 motion on appeal. It affirmed the district court, holding that (1) *Crawford* was not retroactive to cases on collateral appeal – an issue of first impression in Kansas (App. 30-31), and (2) *res judicata* barred Mr. Drach from challenging the admission of the hearsay testimony against him under Kansas's "marital discord" hearsay exception (App. 34-35).

REASONS FOR GRANTING THE WRIT

Mr. Drach's petition for *certiorari* should be granted for two reasons. First, it presents the important federal question of whether the decision of this Court in *Crawford v. Washington* should be applied retroactively to cases on collateral review, an issue for which this Court recently has granted *certiorari*. *Wharton v. Bockting*, 126 S. Ct. 2017 (2006). Second, the decision of the Supreme Court of Kansas upholding the admission of hearsay under Kansas's unique extra-statutory "marital discord" exception to the hearsay rule clearly conflicts with this Court's holdings in *Ohio v. Roberts*, 448 U.S. 56 (1980), *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999). *Res judicata* does not preclude this Court from exercising its *certiorari* jurisdiction over this claim.

I. The decision of this Court in *Crawford v. Washington* created a watershed rule of criminal procedure requiring observance of procedures that are implicit in the concept of ordered liberty and without which the likelihood of an accurate conviction is seriously diminished; under *Teague v. Lane*, 489 U.S. 288 (1989), and *Schriro v. Summerlin*, 542 U.S. 348 (2004), *Crawford* should be applied retroactively to cases on collateral review, and the Supreme Court of Kansas erred in holding otherwise.

In *Crawford v. Washington*, this Court overruled its decision in *Ohio v. Roberts*, 448 U.S. 56 (1980), as to the standards under which testimonial hearsay may be admitted at trial without violating the Sixth Amendment's Confrontation Clause. *Crawford*, 541 U.S. at 67. Whereas *Roberts* conditioned the admission of all hearsay on whether it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness," for testimonial hearsay *Crawford* held that "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 62.

In its decision, the Supreme Court of Kansas held that *Crawford* is not retroactively applicable to cases on collateral review, continuing a nationwide jurisdictional split over that question, which this Court has recognized as an issue of national importance: three weeks before the Supreme Court of Kansas rendered its decision in this case, this Court granted *certiorari* to take up this issue. *Wharton v. Bockting*, 126 S. Ct. 2017 (2006). Two other petitions for *certiorari* concerning this question currently are also before the Court. *New Mexico v. Forbes*, Case No.

05-644 (U.S. filed Nov. 17, 2005); *Lave v. Quarterman*, Case No. 05-11552 (U.S. filed June 16, 2006).

The Ninth Circuit and the Supreme Court of New Mexico have held that *Crawford* is collaterally retroactive per *Teague* and *Summerlin*.[1] The First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits have held otherwise.[2] In addition to Kansas, appellate courts of eleven states agree with those circuits.[3] The remaining federal and state appellate courts have not addressed this question.

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[1] *Bockting v. Bayer*, 399 F.3d 1010, 1012-1013 (9th Cir. 2005), *opinion amended*, 408 F.3d 1127 (9th Cir. 2005), *reh'g en banc denied*, 418 F.3d 1055 (9th Cir. 2005), *cert. granted sub nom.*, *Wharton*, 126 S. Ct. at 2017; *State v. Forbes*, 119 P.3d 144, 148 (N.M. 2005), *cert. filed*, Case No. 05-644 (Nov. 17, 2005).

[2] *McGonagle v. United States*, 137 Fed. Appx. 373, 380 (1st Cir. 2005), *cert. denied*, 126 S. Ct. 506 (2005); *Mungo v. Duncan*, 393 F.3d 327, 336 (2d Cir. 2004), *cert. denied sub nom.*, *Mungo v. Greene*, 544 U.S. 1002 (2005); *Lave v. Dretke*, 444 F.3d 333, 337 (5th Cir. 2006), *cert. filed sub nom.*, *Lave v. Quarterman*, Case No. 05-11552 (U.S. filed June 16, 2006); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005); *Murillo v. Frank*, 402 F.3d 786, 790-791 (7th Cir. 2005); *Evans v. Luebbers*, 371 F.3d 438, 444-445 (8th Cir. 2004), *cert. denied sub nom.*, *Evans v. Roper*, 543 U.S. 1067 (2005); *Brown v. Uphoff*, 381 F.3d 1219, 1226-1227 (10th Cir. 2004), *cert. denied sub nom.*, *Brown v. Lampert*, 543 U.S. 1079 (2005); *Espy v. Massac*, 443 F.3d 1362, 1367 (11th Cir. 2006).

[3] *In re Moore*, 133 Cal. App. 4th 68, 77-78 (2005); *Edwards v. People*, 129 P.3d 977, 988 (Colo. 2006), *reh'g denied*, 2006 Colo. LEXIS 214 (2006); *Chandler v. Crosby*, 916 So. 2d 728, 731 (Fla. 2005); *Redwine v. State*, 280 Ga. 58, 63, 623 S.E.2d 485 (2005); *State v. Williams*, 695 N.W.2d 23, 29 (Iowa 2005); *Commonwealth v. Kartell*, 20 Mass. L. Rptr. 134 (Mass. Super. 2005); *Danforth v. State*, 700 N.W.2d 530, 532 (Minn. App. 2005), *review granted in part and pending* (Minn. Oct. 18, 2005); *Ennis v. State*, 122 Nev. Adv. Rep. 60 (Nev. 2006); *State v. Potts*, 2006 Ohio 2100, *P17 (Ohio App. 2006); *Commonwealth v. Brooks*, 875 A.2d 1141, 1148 (Pa. Super. 2005); *In re Markel*, 154 Wash.2d 262, 273, 111 P.3d 249 (2005).

Without exception, "new rules always have retroactive application to criminal cases on direct review." *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993). If a decision expressly overrules a prior decision, it is a "new rule." *Graham v. Collins*, 506 U.S. 461, 467 (1993). As to collateral review, however, unless they fall "within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989). There are two exceptions: (1) if the new rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and (2) if the new rule "requires the observance of those procedures that are implicit in the concept of ordered liberty," meaning "watershed rules of criminal procedure." *Id.* at 311. Watershed rules are those which "properly alter our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction," such as "the right to counsel at trial . . . " *Id.* at 311-312. Such rules are those "without which the likelihood of an accurate conviction is *seriously* diminished." *Shriro v. Summerlin*, 542 U.S. 348, 352 (2004).

The *Teague* doctrine arose out of the three criteria this Court historically has employed to determine whether a new Constitutional doctrine should be applied retroactively: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Brown v. Louisiana*, 447 U.S. 323, 328 (1980) (quoting *Stovall v. Denno*, 388 U.S. 293, 297 (1967)). Foremost among these three factors is the first one, "the

purpose to be served by the new constitutional rule." *Id.* (quoting *Desist v. United States*, 394 U.S. 244, 249 (1969)). A new Constitutional rule must be given complete retroactive effect where its main purpose is to overcome an aspect of a criminal trial which substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. *Id.* at 328 and 334. This is because "Any practice that threatens the jury's ability properly to perform [its truth-finding] function poses a similar threat to the truth-determining process itself." *Id.* at 334. When the new rule overcomes impairment to truth-finding, not even the third factor – the burden on the administration of justice – can overcome retroactivity. *Id.* (citing *Williams v. United States*, 401 U.S. 646, 653 (1971) (plurality opinion of White, J.)).

Under these standards, this Court has declared to be fully retroactive a variety of new Constitutional rules of criminal procedure – watershed rules without which the likelihood of an accurate conviction is *seriously* diminished. This includes new rules guaranteeing the accused's right to assistance of counsel at trial, *Gideon v. Wainwright*, 372 U.S. 355 (1963), at arraignment, *Hamilton v. Alabama*, 368 U.S. 52 (1961), at a guilty plea hearing, *Arsenault v. Massachusetts*, 393 U.S. 5 (1968), at hearings over the revocation of probation, *McConnell v. Rhay*, 393 U.S. 2 (1968), and on appeal, *Douglas v. California*, 372 U.S. 353 (1963). As well, new rules have been declared fully retroactive involving the admission into evidence of extrajudicial confessions, *Roberts v. Russell*, 392 U.S. 293 (1968), the procedure to be used in determining the voluntariness of confessions, *Jackson v. Denno*, 378 U.S. 368 (1964), the procedure to be used in determining an indigent appellant's right to a free transcript, *Griffin v. Illinois*, 351

U.S. 12 (1956), the standard of proof required in trials of juveniles for offenses which would be crimes if committed by an adult, *V. v. New York*, 407 U.S. 203 (1972), the application of the Constitutional guarantee against double jeopardy to the states, *Price v. Georgia*, 398 U.S. 323 (1970), and the impropriety of disqualifying prospective jurors because they have certain views as to capital punishment. *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

Analogous to the rule at issue in *Crawford*, however, is *Berger v. California*, 393 U.S. 314 (1969) (*per curiam*), in which this Court declared the new rule announced in *Barber v. Page*, 390 U.S. 719 (1968), to be retroactive to cases that had become final before *Barber* was announced. In *Barber*, this Court promulgated a new rule – interpreting the Confrontation Clause – governing the propriety of introducing, at a jury trial, the transcripts of preliminary hearing testimony of witnesses not present at trial. *Id.* at 721. There, the Court emphasized, "There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)). Discussing the retroactivity of *Barber* in *Berger*, the Court unanimously and unequivocally held that violation of the Confrontation Clause can have "a significant effect on the 'integrity of the fact-finding process,'" *Berger*, 393 U.S. at 315 (referring to *Linkletter v. Walker*, 381 U.S. 618, 639 (1965)), thereby invoking the "purpose" criterion of the classic tripartite analysis. Even the prosecution's "claim of a significant countervailing

interest based upon reliance on previous standards" was "most unpersuasive" against full retroactivity. *Id.*

Crawford clearly fits the second *Teague* exception – even more so than the new Confrontation Clause rule in *Barber* that this Court declared fully retroactive in *Berger*. Whereas *Barber* concerned the admission of a transcript of sworn testimony from a preliminary hearing, *Crawford* involves the admission of evidence that is even more unreliable under the Sixth Amendment: testimonial hearsay. In overruling the hearsay approach of *Ohio v. Roberts* – "a fundamental failure" on the part of the Court "to interpret the Constitution in a way that secures its intended constraint on judicial discretion," *Crawford*, 541 U.S. at 67 – the Court announced a watershed rule of procedure without which the likelihood of an accurate conviction is seriously diminished. Just as in *Barber* and *Berger*, the violations of the Confrontation Clause permitted erroneously by *Roberts* had a significant negative effect on the integrity of the fact-finding process. The new rule of *Crawford* overcomes this impairment to truth-finding: instead of the admission of testimonial hearsay being conditional on whether it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness," as it was under *Roberts*, now, under *Crawford*, when the hearsay is testimonial – as it was in this case – "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 62. As the Ninth Circuit observed in *Bockting*,

> [A]t the heart of the Court's concerns in *Crawford* was the *reliability* of admitted evidence. Where admitted evidence is unreliable, the accuracy of convictions is seriously undermined. That

> the rule in *Crawford* is one without which the accuracy of convictions would be seriously undermined is further borne out by the Court's own description of its prior doctrine as a "rare case" of "fundamental failure." [*Crawford*, 541 U.S. at 67]. The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an "absolute pre-requisite to fundamental fairness."

399 F.3d at 1018-1019 (quoting *Sawyer v. Smith*, 497 U.S. 227, 244 (1990)).

For testimonial hearsay of an unavailable declarant to be admissible, *Crawford*'s new watershed rule of criminal procedure requires that there be a prior opportunity to cross-examine the declarant. In Mr. Drach's case, the testimonial hearsay was that of six counselors and aid workers who elicited the alleged declarations from Mrs. Drach in the course of her treatment for severe depression and alcoholism while attempting to convince her to divorce her husband and press charges against him for supposed spousal abuse. By the time of trial, Mrs. Drach – the decedent – was unavailable. Although her alleged statements were elicited in an accusatory manner and made under circumstances that the witnesses believed would be available for use at a later trial, there was no prior opportunity to question her as to the veracity of the alleged statements.

Therefore, if *Crawford* is retroactively applicable on collateral review, the admission of that highly prejudicial hearsay against Mr. Drach – the only evidence against him that he was unable to rebut directly, because he could not possibly have done so after Mrs. Drach's death – clearly

violated the Confrontation Clause. The defense rebutted the prosecution's forensic evidence. It rebutted the prosecution's evidence against the propensity of the decedent to commit suicide. It could not, however, rebut the specious hearsay testimony regarding Mr. Drach's character that was completely out of line with all the other evidence regarding the Drachs' relationship introduced at trial. Without that hearsay testimony, reasonable doubt clearly exists that Mr. Drach committed the crime of premeditated murder. Applying *Crawford* retroactively to this case undoubtedly would affect the reliability of Mr. Drach's conviction. The rule in *Crawford* is one "without which the likelihood of an accurate conviction is *seriously* diminished."

This Court should issue its writ of *certiorari* to answer the important federal question of whether its testimonial hearsay rule announced in *Crawford v. Washington* is retroactive to cases on collateral appeal.

II. If *Crawford v. Washington* is not retroactively applicable, the decision of the Supreme Court of Kansas upholding the admission of hearsay evidence under Kansas's unique, extra-statutory marital discord hearsay exception violates the Confrontation Clause of the Sixth Amendment, in direct conflict with the decision of this Court in *Ohio v. Roberts*, 448 U.S. 56 (1980) and its progeny, *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999).

Without question, "it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law." *Crawford*, 541 U.S. at 68.

This Court consistently recognizes, however, that there are clear limits to that flexibility. Where a state's rationale for admitting hearsay evidence falls outside the boundaries of what the Confrontation Clause allows, it is unconstitutional and erroneous. *See Wright*, 497 U.S. at 817; *Lilly*, 527 U.S. at 134 and 127. The decision of the Supreme Court of Kansas in this case upheld just such an unconstitutional hearsay exception when it affirmed the admission of hearsay testimony against Mr. Drách under Kansas's unique marital discord hearsay exception. This Court should not tolerate such an assault on the Confrontation Clause.

In 1967, the Supreme Court of Kansas transcended the Kansas Legislature's enumerated hearsay exceptions in K.S.A. § 60-460 to create a new exception to the general proscription of hearsay evidence: the marital discord exception. *State v. Patterson*, 200 Kan. 176, 182, 434 P.2d 808 (1967). This exception, directed solely at cases of alleged marital homicide, allows the prosecution to admit into evidence *any* hearsay statements that the decedent allegedly made concerning abusive treatment or threats by the defendant. *See State v. Rice*, 261 Kan. 567, 583-85, 932 P.2d 981 (1997). Neither this Court, nor the Federal Rules of Evidence, nor any other common-law jurisdiction, nor even the Kansas Statutes recognize such a broad exception. *See* Christine Arguello, *The Marital Discord Exemption to Hearsay: Fact or Judicially-Legislated Fiction?*, 46 KAN. L. REV. 63, 63-66 (1997).

At Mr. Drach's trial, the trial court admitted hearsay testimony (detailed *ante*) under a presumed, sweeping *res gestae* exception. On direct appeal of his judgment of conviction and sentence, Mr. Drach argued that the *res gestae* exception, long abandoned in the federal courts,

violated the Confrontation Clause and accordingly was reversible error. The Supreme Court of Kansas bypassed that argument and held instead that the hearsay testimony was "admissible under the marital discord exception," and therefore, "Drach's argument under this issue is moot" (App. 63). Accordingly, in his state habeas case, Mr. Drach argued that admission of the testimony under the marital discord exception also violated the Confrontation Clause. The state court disagreed, however, and affirmed the admission of the hearsay under the marital discord exception (App. 34-35).

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court held that hearsay from an unavailable declarant is only admissible "if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness." *Id.* Therefore, "the 'indicia of reliability' requirement could be met in either of two circumstances: [1] where the hearsay statement 'falls within a firmly rooted hearsay exception,' or [2] where it is supported by 'a showing of particularized guarantees of trustworthiness.'" *Wright*, 497 U.S. at 816 (citations omitted). Here, the admission of the hearsay under the marital discord exception fails to satisfy either circumstance.

The marital discord exception clearly is not a firmly rooted hearsay exception. Under *Roberts*, a hearsay exception is "firmly rooted" if "in light of 'longstanding judicial and legislative experience,' . . . it 'rests [on] such [a] solid foundation that admission of virtually any evidence within [it] comports with the substance of the constitutional protection.'" *Lilly*, 527 U.S. at 126 (citing

Roberts, 448 U.S. at 66 (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895))). To determine whether an exception fits this definition, the Court considers: (1) the length of time the exception has existed; (2) the number of jurisdictions that recognize the exception; and (3) whether the Federal Rules of Evidence recognize the exception. *White*, 502 U.S. at 356.

Employing this analysis, this Court has declared the following to be "firmly rooted" exceptions: "voluntary admissions against the declarant," *Lilly*, 527 U.S. at 127, "exculpatory evidence offered by a defendant who claims that the declarant committed or was involved in the offense," *id.* at 130, "spontaneous declarations," *White*, 502 U.S. at 356, and "statements made for purposes of medical diagnosis or treatment." *Id.* Likewise, this Court has held several purported exceptions *not* to be firmly rooted under *Roberts*: the "residual exception," *Wright*, 497 U.S. at 817, "accomplice confessions," *Lilly*, 527 U.S. at 134, and a sweeping "statements against penal interest" exception standing on its own. *Id.* at 127.

Kansas's "judicially created marital discord exception" plainly does not satisfy the considerations necessary for it to be a firmly rooted hearsay exception under *Roberts*, *Wright*, *White*, and *Lilly*. The first consideration in determining whether a hearsay exception is firmly rooted is the length of time it has existed. The Supreme Court of Kansas first announced the marital discord exception in 1967 in *State v. Patterson*, 200 Kan. at 176. It has only existed for less than forty years, *far* less time than the exceptions this Court has upheld as "firmly rooted," all of which had support in English law before American independence in 1776. *See Lilly*, 527 U.S. at 127, 130; *White*, 502 U.S. at 356. Under this Court's reading, the length of existence of

Kansas's marital discord exception does not compare with that of a firmly rooted exception.

The second consideration is the number of jurisdictions that recognize the exception. The marital discord exception is unique to Kansas. No other jurisdiction anywhere recognizes it. *See* Arguello, 46 KAN. L. REV. 63. The marital discord exception lacks any support whatsoever in this element.

The third consideration is whether the Federal Rules of Evidence recognize the exception. They do not. The Federal Rules plainly have no marital discord exception to hearsay. Nowhere in Federal Rules of Evidence 803-807, which discuss the exceptions to hearsay under federal law, is anything even vaguely resembling the marital discord exception recognized or understood.

The marital discord exception thus cannot be "firmly rooted" as this Court has interpreted such exceptions in *Wright*, *White*, and *Lilly*. It has existed for a very short time. It exists only in Kansas. It has no analogy in the Federal Rules of Evidence. Accordingly, the hearsay testimony admitted against Mr. Drach would be lawful only if it was supported by a showing of particularized guarantees of trustworthiness.

The admission of the hearsay evidence, however, clearly could not possibly have had such support. Under *Roberts*, the "particularized guarantees of trustworthiness" that a trial court is required to find for admission under the Confrontation Clause must be drawn "from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief." *Wright*, 497 U.S. at 820. A statement that satisfies this requirement must be "so trustworthy that

adversarial testing would add little to its reliability." *Id.* at 821.

So, "unless an affirmative reason, arising from the circumstances in which the statement was made, provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement." *Id.* The hearsay must be reliable "by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.* at 822. "In other words, if the declarant's truthfulness is so clear from the surrounding circumstances *that the test of cross-examination would be of marginal utility*, then the hearsay rule does not bar admission of the statement at trial." *Id.* at 820 (emphasis added).

The hearsay evidence at issue was that of volunteers and professionals who testified that Mrs. Drach allegedly told them her husband had abused her. Over the defense's objection, the trial court invoked the *res gestae* exception to hearsay and admitted the evidence. On direct appeal, the Supreme Court of Kansas held that analysis of *res gestae* was unnecessary because the evidence was admissible under the marital discord exception (App. 63). Because the marital discord exception is not "firmly rooted" under this Court's approach per the *Roberts* doctrine, the trial court would have needed to find that Mrs. Drach's alleged statements had particularized guarantees of trustworthiness to be admissible. That is, the alleged statements of Mrs. Drach must have been so trustworthy that adversarial testing would add little to their reliability. The test of cross-examination of Mrs. Drach would have needed to be of marginal utility. Such findings would have needed to be clear from the totality of

circumstances surrounding the statements and not based on any other evidence introduced at trial.

It simply does not make sense to say that the alleged statements of Mrs. Drach offered as hearsay had these "particularized guarantees of trustworthiness" so that adversarial testing through cross-examination of Mrs. Drach would have added little to their reliability and would have been "of marginal utility." Mrs. Drach was an alcoholic. She was severely depressed. Evidence at trial indicated that she had attempted to commit suicide in the months following the deaths of her mother and son. Evidence also indicated that she often was clumsy and fell down. The hearsay witnesses were attempting to get Mrs. Drach to leave her husband. They said that she told them her husband had abused her. Her brother-in-law, however, testified that Mrs. Drach told him she had fabricated those statements so as to appease what the hearsay witnesses wanted of her.

Thus, if Mrs. Drach were alive to be cross-examined at trial as to the veracity of and circumstances under which she allegedly made these statements, such adversarial testing would have been of *great* utility. In light of the evidence of her alcoholism, her suicide attempts, her physical instability, and her alleged untruthfulness to the hearsay witnesses, the defense directly could have impeached these statements. Clearly, the hearsay testimony did not possess the "particularized guarantees of trustworthiness" necessary to satisfy this Court's Confrontation Clause analysis under *Roberts* and *Wright*.

In its decision, the Supreme Court of Kansas stated that there were particularized guarantees of trustworthiness because "the trial court is presumed to have made all

necessary factual findings to support its judgment" (App. 35). Particularized guarantees of trustworthiness are necessary to admit hearsay testimony where no "firmly rooted" hearsay exception applies. At trial, the court admitted the hearsay testimony under the *res gestae* exception, which we may presume the district court believed was firmly rooted under *Roberts*. Under the trial court's reasoning, no particularized guarantees of trustworthiness were necessary to support the admission of the hearsay. The Supreme Court of Kansas disagreed but held that they still were admissible under the marital discord exception, imputing a finding of particularized guarantees to the trial court anyway.

The decision of the Supreme Court of Kansas therefore seems to suggest that the trial court had the ability to divine the future. The trial court, erroneously believing the hearsay to be proper under a *res gestae* exception with no particularized guarantees of trustworthiness necessary, could not possibly have known that the Supreme Court of Kansas would rule otherwise on direct appeal. The state supreme court cannot then logically assert that the trial court *did* make those findings because "the trial court is *presumed* to have made all necessary factual findings to support its judgment," (App. 35) (emphasis added), because the trial court did not believe that such findings were necessary at the time of trial. To hold otherwise is to find that the trial court had powers of divination. This line of reasoning clearly makes no sense.

The hearsay testimony admitted at trial did not have the particularized guarantees of trustworthiness necessary to satisfy the Confrontation Clause under *Roberts* and its progeny. The rule in Kansas that "the trial court is presumed to have made all necessary factual findings to

support its judgment" is not valid here, because the trial court did not believe that such factual findings were necessary under its erroneous approach to hearsay. Because the marital discord exception is not "firmly rooted" under *Wright*, *White*, and *Lilly*, and the hearsay testimony did not have the "particularized guarantees of trustworthiness" necessary to satisfy the Confrontation Clause, the admission of the hearsay testimony against Mr. Drach under Kansas's marital discord hearsay exception violated the Confrontation Clause.

Because marital discord is not a firmly rooted exception and the trial court could not logically have made the necessary factual findings as to satisfy the particularized guarantees of trustworthiness to survive Constitutional scrutiny under the *Roberts* approach, the admission of the hearsay evidence violated Mr. Drach's Sixth Amendment right to confront the witnesses against him. The Supreme Court of Kansas clearly erred in holding otherwise.

Thus, this Court should issue its writ of *certiorari* to answer the important federal question of whether the decision of the Supreme Court of Kansas upholding the admission of hearsay evidence under Kansas's unique, judicially-created, extra-statutory "marital discord" hearsay exception violated the Confrontation Clause, in direct conflict with this Court's decisions in *Roberts*, *Wright*, *White*, and *Lilly*.

III. The decision of the Supreme Court of Kansas that *res judicata* barred Mr. Drach from challenging the Constitutionality of admitting hearsay evidence under Kansas's unique marital discord exception does not preclude this Court from exercising *certiorari* jurisdiction over his federal claim.

Under its doctrine that "where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived," *State v. Neer*, 247 Kan. 137, 140-141, 795 P.2d 362 (1990), the Supreme Court of Kansas held that *res judicata* barred Mr. Drach from challenging the Constitutionality of admitting hearsay evidence against him under its marital discord exception (App. 34-35). In some circumstances, this holding could constitute an independent and adequate ground of state law barring this Court from exercising its *certiorari* jurisdiction. Here, however, the unique development of Kansas's *res judicata* doctrine create a federal question of whether the Supreme Court of Kansas's application of *res judicata* to Mr. Drach's marital discord argument conflicts with this Court's holding in *Teague*. Moreover, even if the *res judicata* holding remains a non-federal ground here, it is clearly unsupportable and must be disregarded.

This Court declines "to review state court judgments which rest on independent and adequate state grounds," *Fay v. Noia,* 372 U.S. 391, 428 (1963). *Res judicata* usually qualifies as one such state ground. *See Durley v. Mayo*, 351 U.S. 277, 284-285 (1956). Where the state law is based on federal law or a prior decision of this Court, however, it is

not so independent or adequate as to defeat this Court's jurisdiction. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2522 (2006) (*certiorari* jurisdiction was not defeated by ground of state law where state law rested on a prior decision of this Court). The Supreme Court of Kansas expressly adopted its doctrine of *res judicata* on collateral review from this Court's own definition in *Teague*. *See Neer*, 247 Kan. at 142 (quoting *Teague*, 489 U.S. at 297). Therefore, the Kansas court's judgment that *res judicata* barred Mr. Drach from raising his marital discord claim cannot be an independent and adequate ground of state law. Effectively, the Kansas court held that this Court's interpretation of *res judicata* on collateral review in *Teague* barred Mr. Drach's claim. Whether *res judicata* did, in fact, bar Mr. Drach, therefore rests on an interpretation of a prior decision of this Court. Accordingly, the Kansas court's application of *res judicata* to Mr. Drach is wholly within this Court's jurisdiction to review.

The Kansas court clearly erred in applying *res judicata* to Mr. Drach's cause. On direct appeal, Mr. Drach argued that admitting the hearsay under a purported *res gestae* exception violated the Confrontation Clause. In that appeal, the Supreme Court of Kansas held that even if admission as *res gestae* was unconstitutional, the hearsay was admissible on alternative grounds under Kansas's marital discord hearsay exception. Accordingly, in his state *habeas* case, Mr. Drach argued that admitting the hearsay under that exception also was unconstitutional. Because Mr. Drach could not possibly have raised the issue of the marital discord exception's Constitutionality on direct appeal, *res judicata* is inapplicable.

This Court will refuse to defer to a ground of state law where it clearly is unsupportable. *NAACP v. Alabama ex*

rel. Patterson, 357 U.S. 449, 455 (1958). For, "if non-federal grounds, plainly untenable, may be thus put forward successfully, [this Court's] power to review easily may be avoided." *Ward v. Bd. of County Comm'rs*, 253 U.S. 17, 22 (1920). Accordingly, where *res judicata* "is so clearly ill founded that it cannot sustain the judgment," it will not qualify as an independent or adequate ground of state law, particularly where it has been used to strip a defendant of a fundamental federal right. *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 475-476 (1918).

If the application of Kansas's doctrine of *res judicata* is offered as a ground of state law in this case, it is wholly unsupportable. At Mr. Drach's trial, the court admitted this hearsay testimony only under the *res gestae* exception. Accordingly, on direct appeal to the Supreme Court of Kansas in 2000, Mr. Drach argued that admission of the hearsay under the *res gestae* exception violated the Confrontation Clause as construed under *Roberts*. The Kansas appellate court ruled that even if the evidence was inadmissible under the *res gestae* exception (or even if *res gestae* was an unconstitutional exception), it would, for the first time, raise the marital discord exception to allow the evidence.

On direct appeal, Mr. Drach never argued that the judicially-created marital discord exception was itself unconstitutional. Instead, his argument concerned only the *res gestae* because that was the sole ground cited by the trial court. Accordingly, the issue of whether the marital discord exception that the state supreme court had used on direct appeal violated the Confrontation Clause properly was raised for the first time in his state habeas case. Plainly, he presented a new argument. He did not present it in his direct appeal. He could not have

presented it in his direct appeal, because the error below was the admission of the hearsay under the *res gestae* exception. He could not have known that the Supreme Court of Kansas *sua sponte* would employ the marital discord exception to uphold the admission of the hearsay. Therefore, whether the admission of the hearsay testimony under Kansas's "marital discord" exception violates the Confrontation Clause was a new issue in his state habeas case.

In its decision affirming Mr. Drach's conviction on direct appeal, the Kansas court stated, "Hearsay statements made by a deceased spouse-declarant are admissible as evidence of marital discord if the trial court finds that the statements have particular guarantees of trustworthiness. See *Ohio v. Roberts*" (App. 63) (other citations omitted). Mr. Drach challenged the Constitutionality of the marital discord exception as not fitting within the "firmly rooted hearsay exception" and "particularized guarantees of trustworthiness" requirements that this Court promulgated in *Roberts* and its progeny. Clearly, this issue was not before the Kansas court on direct appeal. It could not have been. Thus, because the issue was not raised on direct appeal, and it was unmistakably a new issue before the Kansas court, the doctrine of *res judicata* simply was unsupportable.

Kansas's *res judicata* doctrine as pertaining to collateral review cannot be an independent and adequate ground of state law: it rests expressly on this Court's holding in *Teague*. The Kansas court erred in applying that holding to Mr. Drach's marital discord argument. Even if it is a non-federal ground, its application to this claim clearly is unsupportable and ill-founded. The admission of hearsay testimony under Kansas's unique marital

discord exception plainly violates the Confrontation Clause. The Kansas court's invocation of *res judicata* only served to strip Mr. Drach of his Sixth Amendment rights and uphold Kansas's maverick hearsay exception. If *res judicata* is a federal ground here, applying it to Mr. Drach was error. If it is a non-federal ground, it is unsupportable and must be disregarded.

CONCLUSION

This Court should issue its writ of *certiorari* to review the decision of the Supreme Court of Kansas in this case.

Respectfully submitted,

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ROGER DRACH, Appellant, v. LOUIS BRUCE and STATE OF KANSAS, Appellees.

No. 93,654

SUPREME COURT OF KANSAS

136 P.3d 390; 2006 Kan. LEXIS 364

June 9, 2006, Opinion Filed

PRIOR HISTORY: Appeal from Finney district court, MICHAEL L. QUINT, judge.

DISPOSITION: Affirmed.

SYLLABUS: BY THE COURT

1. When reviewing the denial of a K.S.A. 60-1507 motion following an evidentiary hearing before the district court, the appellate court reviews the factual underpinnings of the district court's decision by a substantial competent evidence standard and applies a de novo standard when reviewing the district court's decision. The ultimate denial of the 60-1507 motion involves a legal question requiring independent appellate review.

2. Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. In other words, substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion.

3. The right to present witnesses to establish a defense is guaranteed under the Sixth Amendment right to compulsory process. It is fundamental to a fair trial, and denial of the right is a denial of due process under the Fourteenth Amendment to the United States Constitution.

Defendants have a right to testify in their own behalf. The decisions which are to be made by the accused after full consultation with counsel are: (1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify on his or her own behalf.

4. A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. Both the performance and prejudice prongs of the ineffective assistance of counsel inquiry are mixed questions of law and fact on appeal requiring de novo review.

5. With no objection to inadequate factual findings, the trial court is presumed to have made all necessary factual findings to support its judgment.

6. The district court was in the better position to weigh the credibility of the witnesses, and this court does not pass on the credibility of witnesses or reweigh conflicting evidence.

7. The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the

witnesses against him or her. This constitutional provision does not preclude the admission of all out-of-court statements. In determining the admissibility of hearsay exceptions, the court must also consider the requirements of the Confrontation Clause of the United States Constitution. The Confrontation Clause can operate to bar the admission of evidence that would otherwise be admissible under an exception to the hearsay rule if confrontation requirements are not met.

8. Kansas appellate courts have applied a three-step analysis for determining whether a change in the law should be applied retroactively in a criminal case under collateral attack. First, the court must determine whether the movant has properly raised the issue in his or her collateral attack. Supreme Court Rule 183(c) (2005 Kan. Ct. R. Annot. 228) limits the issues that may be raised in a collateral attack. Second, the court determines whether the case was final when the new law was established. If a case was final when the new law was established, the general rule is that the new law will not be applied to cases on collateral attack. Third, if the case was final before the new law was established, the court must determine whether any exception to the general rule against retroactive application applies.

9. A new rule of constitutional criminal procedure is not applied retroactively on collateral review unless (1) it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prosecute, or (2) it is a watershed rule requiring the observance of those procedures that are implicit in the concept of ordered liberty.

10. New rules of procedure generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. That a new procedural rule is fundamental in some abstract sense is not enough; the rule must be one without which the likelihood of an accurate conviction is seriously diminished. This class of rules is extremely narrow.

11. The new Confrontation Clause analysis set forth in *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004), is not a watershed rule entitled to retroactive application on collateral appeal because it was not one without which the likelihood of an accurate conviction is seriously diminished.

12. Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised; those issues that could have been presented, but were not presented, are deemed waived. Where a defendant's claim has not been raised at trial or on direct appeal, such a default prevents the defendant from raising the claim in a second appeal or in a collateral proceeding.

13. When a second appeal is brought to this court in the same case, the first decision is the settled law of the case on all questions involved in the first appeal, and reconsideration will not normally be given to such

questions. Ordinarily, under the law of the case doctrine, once an issue is decided by the court, it should not be relitigated or reconsidered unless it is clearly erroneous or would cause manifest injustice.

14. Res judicata, rather than the law of the case doctrine, applies to issues raised in a K.S.A. 60-1507 civil proceeding which have previously been resolved by a final appellate court order in his or her criminal proceeding.

15. A K.S.A. 60-1507 motion cannot be used as a substitute for a second appeal, absent a showing the trial error affected constitutional rights and a showing of exceptional circumstances.

COUNSEL: Jeremiah J. Kidwell, of Kansas City, Missouri, argued the cause, and Dennis J.C. Owens, of Kansas City, Missouri, was with him on the briefs for appellant.

Lois K. Malin, assistant county attorney, argued the cause, and John P. Wheeler, Jr., county attorney, and Phill Kline, attorney general, were with her on the brief for appellee.

JUDGES: The opinion of the court was delivered by DAVIS, J.:

OPINION BY: DAVIS

OPINION: The opinion of the court was delivered by

DAVIS, J.: Roger Drach's convictions of first-degree premeditated murder, aggravated battery with great bodily harm, and criminal possession of weapons in this marital homicide case were upheld in *State v. Drach*, 268 Kan. 636, 1 P.3d 864 (2000). Drach appeals the denial of his K.S.A. 60-1507 motion alleging that counsel was ineffective by depriving him of the right to testify on his

own behalf and that his convictions were based on inadmissible hearsay evidence in violation of the Confrontation Clause. We disagree and affirm.

Roger Drach was convicted of first-degree premeditated murder, aggravated battery with great bodily harm, and criminal possession of weapons in connection with the death of his wife, Deanne Drach. A summary of the facts giving rise to the charges and convictions as set forth in our *State v. Drach*, 268 Kan. 636, 1 P.3d 864, decision follows:

> "Deanne died on August 19, 1994, as a result of a gunshot wound to the chest. This case was not commenced until nearly 2 years after her death. The main issue at trial was whether Deanne had committed suicide or had been murdered by Drach.
>
> "Drach claimed Deanne committed suicide, that he was not in the room when she was shot, and that he found her on the bed after he heard the shot. The State's expert witnesses testified the wound could not have been self-inflicted. Drach's expert witnesses testified they were 99.5% certain the wound was self-inflicted.
>
> . . . .
>
> "After review of the extensive record (18 volumes, the longest of which is 291 pages), two relevant facts emerged: Deanne had an affair 28 years before her death, and she had been abused since her husband discovered the affair shortly after it occurred.
>
> "At trial, there was much hearsay evidence of abuse suffered throughout the 34-year-marriage, none of which is pinned down by time or date.

"When Deanne's body was examined at the scene, she was on the bed in the southeast corner of the room. The gun that was used to shoot her was in the northwest corner of the room. The gun was a derringer. Both parties' experts testified the bullet had been fired from the top barrel. Yet, the top barrel had a live round with a dented primer in it and an empty cartridge in the bottom chamber.

"Both old and new blood stains consistent with Deanne's blood were found throughout the house, in Deanne's purse, in her clothing, and in Drach's car, which would indicate Deanne had been abused for a long period of time.

"When Deanne's body was examined, she was lying in fresh blood but had dried blood on her arms and back. She had a 2.5 centimeter laceration on the back of her head that went to the bone, two black eyes, a laceration above the right eye, and bruises all over her body. X-rays revealed new fractures of the 9th, 10th, and 11th ribs.

"Two autopsies revealed old fractures of the 7th, 10th, 11th, and 12th ribs on the right side; a healing fracture of the left ulna; a fracture of the right arm that had recently been refractured; and a gunshot wound to the left arm.

"Drach gave accounts of what happened that did not appear to be accurate. For example, in discussing a broken window, Drach said he had to break into the house because he did not have his key. Law enforcement officers testified the window was broken from the inside out. Drach testified that Deanne had facial bruises when he checked her out of the hospital. Three witnesses testified, however, that Deanne had no visible

> marks on her when they last saw her, including the discharging nurse at the hospital.
>
> "Drach also said he thought Deanne was drinking again when she died. The autopsy report showed her blood alcohol concentration was .000. Drach also told officers Deanne got her gun out of her car the day she was shot. Her car was in storage at Dodge City at all pertinent times and had been for some time." 268 Kan. at 637-39.

In the original appeal affirming Drach's convictions and sentences, we rejected Drach's argument that the marital discord evidence admitted by the district court as res gestae was inadmissible hearsay because it fell under the marital discord exception. We also concluded that such evidence was not violative of the Confrontation Clause because the statements had particular guarantees of trustworthiness under *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531(1980). 268 Kan. at 648-51.

On October 12, 2004, Drach filed an amended K.S.A. 60-1507 motion claiming that trial counsel was ineffective in failing to inform him of the right to testify on his own behalf and failing to object to prejudicial marital discord testimony. He also claimed that his convictions were based on hearsay testimony which violated the Confrontation Clause under both *Roberts* and *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004).

An evidentiary hearing on the motion was held on October 22, 2004. After hearing testimony from Drach and his trial counsel Richard Marquez and John Lindner, the district court denied the motion, finding overwhelming evidence existed that Drach was informed of his right to testify on his own behalf and that his hearsay claims were resolved against him in his direct criminal appeal

and are bound by res judicata in his 60-1507 motion. The court further concluded that *Crawford* should not be applied retroactively to cases on collateral review, that the marital discord testimony was not testimonial under *Crawford*, and that *Crawford* does not apply under the doctrine of equitable forfeiture because Drach was responsible for Deanne's death. The defendant timely appealed, and we transferred this case on our own motion pursuant to K.S.A. 20-3018(c).

The defendant raises two arguments on appeal: (1) Defense counsel was ineffective by depriving Drach of the right to testify on his own behalf; and (2) inadmissible hearsay marital discord evidence was admitted at trial in violation of the Confrontation Clause under *Roberts* and *Crawford.*

K.S.A. 60-1507 Standard of Review

When reviewing the denial of a K.S.A. 60-1507 motion following an evidentiary hearing before the district court, the appellate court reviews the factual underpinnings of the district court's decision by a substantial competent evidence standard and applies a de novo standard when reviewing the district court's decision. The ultimate denial of the 60-1507 motion involves a legal question requiring independent appellate review.

"Substantial evidence is evidence which possesses both relevance and substance and which furnishes a substantial basis of fact from which the issues can reasonably be resolved. [In other words,] substantial evidence is such legal and relevant evidence as a reasonable person might accept as being sufficient to support a conclusion. [Citation omitted.]" *State v. Luna*, 271 Kan. 573, 574-75, 24 P.3d 125 (2001).

(1) Sixth Amendment Right to Testify

Background

Before the defense rested at trial, Drach had a discussion with his two trial attorneys, Richard Marquez and John Lindner, concerning testifying on his own behalf. The attorneys did not agree whether Drach should testify. Lindner thought the defense did not have "enough" without his testimony, and Marquez was concerned that Drach would lose his temper on the stand and that Drach might have to admit that a battery had occurred. Although Drach made statements that he was paying Marquez to decide if he should testify, both attorneys confirmed that Drach was informed that it was his decision whether to testify and that Drach himself decided that he would not testify. Drach argues that he did not feel like it was his decision to make and the reason why he did not testify was because Marquez did not want him on the stand.

Prior to the State's rebuttal, the district court asked Drach if he understood his Fifth Amendment right against self-incrimination and that it was his decision alone whether to testify on his own behalf. Drach replied that he understood and had decided not to testify. The defense rested without Drach testifying on his own behalf.

During the State's rebuttal, Karen Althaus testified that her husband had an affair with Deanne 25 years earlier. In July 1972, Drach discovered the affair and forced Deanne into the Althauses' home at 1 a.m. Drach was enraged and pointing a gun at a crying Deanne whose clothing was torn. Drach stated that Deanne had confessed to him and he wanted Mr. Althaus to do the same. He made Deanne swear on a Bible to the number of times they had sex, and he struck her across the face demanding

to know what happened. Althaus testified that Drach said he had four bullets and that he would kill Deanne and himself because there was no reason to live. He forced Deanne to call her parents, confess her unfaithfulness, and tell them goodbye. He told her parents to drive to Hutchinson to say goodbye to their daughter, and they left the Althaus residence.

At the 60-1507 hearing, Drach testified that he decided he wanted to testify when Althaus was called as a rebuttal witness. He claimed he twice said, "'Mr. Marquez, she is lying. I've got to testify, I've got to do something.'" Drach said that Marquez waived his hand and said, "'Sit down, sit down.'" Drach did not testify following rebuttal, nor did he talk to his lawyers about their failure to let him testify or raise the issue with the court.

Marquez testified that he did not remember Drach asking to testify during rebuttal. He did recall that Drach got agitated saying the testimony never happened and Marquez tried to calm him down to prevent the jury from seeing him upset. When Marquez asked Drach about Althaus' testimony, Drach first denied knowing who she was and then said that they were friends. Lindner was on his feet objecting to the rebuttal testimony and did not hear the conversation. Lindner was never aware that day that Drach had expressed a desire to testify.

Subsequently during the jury instruction conference, Drach did not express to the district court that he wished to testify when the district court asked if he would like an instruction concerning his decision not to testify at trial. Instead, Drach requested that such an instruction be given.

Discussion

Drach first claims that he was denied his constitutional right to testify on his own behalf through ineffective assistance of counsel. In denying Drach's K.S.A. 60-1507 motion raising this issue, the district court reasoned:

> "3. The first claim of the Plaintiff is that he was not informed of his right to make the decision to testify or not, during the trial. The evidence is overwhelming that he was told on numerous times that it was his decision and he chose not to testify.
>
> A. During the Arraignment, the Journal Entry and the statement of Defense Counsel both confirm that Mr. Drach was told that 'He has the right to testify, but only if he/she so desires.'
>
> B. Both defense counsel confirmed that Mr. Drach was told of his right to make the decision and that both stated that it was his decision, after consulting with his attorneys that he would not do so.
>
> C. That at the conclusion of the defense's case, the Court inquired of the Defendant, Mr. Drach, as follows:
>
> > 'The Court: Mr. Drach, do you understand that you have the Fifth Amendment privilege against self-incrimination, and that's your decision alone whether you wish to testify. And you've made that decision; is that correct sir?
> >
> > 'Roger Drach: Yes, sir.
> >
> > 'The Court: and it's your desire, then not to testify in this matter?
> >
> > 'Roger Drach: Yes sir.' "

"The right to present witnesses to establish a defense is guaranteed under the Sixth Amendment right to compulsory process. It is fundamental to a fair trial, and denial of the right is a denial of due process under the Fourteenth Amendment to the United States Constitution." *State v. Finley*, 268 Kan. 557, Syl. ¶ 1, 998 P.2d 95 (2000). Defendants have a right to testify in their own behalf. *State v. Whitaker*, 260 Kan. 85, 87, 917 P.2d 859 (1996). The "decisions which are to be made by the accused after full consultation with counsel are: (1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify in his own behalf." *State v. McKinney*, 221 Kan. 691, 694-95, 561 P.2d 432 (1977).

"'A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.'" *State v. Gleason*, 277 Kan. 624, 643, 88 P.3d 218 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 [1984]).

"Both the performance and prejudice prongs of the ineffective assistance of counsel inquiry are mixed questions

of law and fact on appeal requiring de novo review." *State v. Griffin*, 279 Kan. 634, Syl. ¶ 6, 112 P.2d 862 (2005).

Before the district court, Drach argued that he "was never informed by his trial counsel that he had the choice to testify on his own behalf." However, substantial evidence in the record on appeal establishes that Drach was advised of his right to testify at trial and decided to waive that right following full consultation with both his attorneys and the court before the defense rested. As such, Drach shifts gears and argues that the performance of Drach's counsel was deficient by refusing to allow him to testify freely on his own behalf *on surrebuttal*. Drach contends he could have countered Althaus' detrimental testimony by testifying that he and his wife were best friends with the Althaus couple, that he did not have a gun with him that night, that he never hurt his wife in 1972, that he went to the Althaus residence around 11 p.m., that he did not make the statements relayed by Althaus at trial, and that no violence occurred that night.

The determination of whether Drach asserted his right to testify during rebuttal amounted to a credibility contest between Drach and Marquez. Although the district court did not make specific findings in this regard, the district court's decision that Drach was informed of his right to testify contrary to his allegations otherwise demonstrates that it found Marquez' testimony more credible. See *State v. Combs*, 280 Kan. 45, 50, 118 P.3d 1259 (2005) ("With no objection to inadequate factual findings, the trial court is presumed to have made all necessary factual findings to support its judgment."). The district court was in the better position to weigh the credibility of the witnesses, and this court does not pass on the credibility of witnesses, reweigh conflicting evidence,

and questions of credibility are resolved in favor of the State. *State v. Moore*, 269 Kan. 27, 30, 4 P.3d 1141 (2000).

As the appellate court must accept as true the evidence and all inferences drawn from the evidence which tend to support the findings of the trial judge, Drach has not established that counsel's representation was deficient. Even if he had demonstrated a deficiency, Drach has not established prejudice by his inability to personally refute this testimony: Drach had presented 12 witnesses during his case in chief who testified that they had never seen Drach act in a violent manner toward Deanne. Clearly the jury by its verdict believed that Drach had been violent with Deanne.

(2) Admission of Marital Discord Testimony in Violation of the Confrontation Clause

Background

In a pretrial hearing, the defense challenged the admission of marital discord testimony on the grounds that it was inadmissible hearsay admitted as res gestae and presented a confrontation issue. The 60-1507 court responded that the Kansas Supreme Court had ruled upon those issues and had carved out a specific exception for marital discord cases. Although a plethora of marital discord evidence was introduced at trial, Drach points to the testimony of Lana Christensen, Carol Taylor, Janet Meyers, Marvelle Darough, Marvelle Sosa, and Dora Hermosillo as the hearsay witnesses in his K.S.A. 60-1507 motion. We summarized this evidence in the direct appeal as follows:

> "Approximately 2 months before her death, Deanne went to St. Catherine's Hospital in Garden City. Deanne was inebriated, barefoot, not

wearing her broken glasses, and her hair was in disarray. Drach was arrested for domestic battery. Deanne told Family Crisis Services workers [Christensen & Taylor] who testified at trial, that Drach had threatened her life. They also testified that Deanne had related to them that Drach had often beat her over the years and had repeatedly threatened her life over an affair that she had over 25 years previous. Deanne also reported to the workers that she had suffered broken ribs and arms over the years. Deanne further told the workers that she had been shot in the shoulder by Drach on a previous occasion. The workers observed a scar on Deanne's shoulder. Deanne told the workers that Drach had forbid her from seeking medical attention for most of these injuries.

"Deanne related the same facts to a counselor in Dodge City [Hermosillo] who testified at trial. The counselor testified that Deanne had told her about times when Drach hit her in the face, stomach, and arms.

"Approximately 1 month before her death, Deanne was admitted to St. Joseph's Hospital in Wichita. A doctor [Meyers] testified that he noticed scars about her face and arms. Deanne told him that Drach had caused the scars." 268 Kan. at 648.

Additionally, Dr. Meyers referred Deanne to Marvelle Darrough, a therapist who testified at trial that she had learned of the spousal abuse while working with Deanne. Deanne described horrific beatings, being repeatedly threatened with a gun, and being burned with an iron. Darrough diagnosed her with battered woman syndrome with trauma syndrome. Marvelle Sosa, an addictions counselor with the hospital, testified that she remembered

Deanne because she had endured a lot of "awesome" spousal abuse.

In the direct appeal, Drach argued that evidence of Deanne's statements about spousal abuse she had suffered at the hands of Drach constituted inadmissible hearsay and prior bad acts. We found that although the trial court had admitted the evidence on the grounds of res gestae, Kansas courts had consistently admitted evidence of marital discord even though it may fall under the traditional notion of hearsay or prior bad acts. We further noted that hearsay statements made by a deceased spouse declarant are admissible as evidence of marital discord if the trial court finds that the statements have particular guarantees of trustworthiness under *Roberts*. Finally, we found that the question of whether the admission of the evidence as res gestae violated the Confrontation Clause was moot because the evidence was admissible under the marital discord exception. 268 Kan. at 650-51.

In his K.S.A. 60-1507 motion, Drach argued the marital discord testimony presented by the above six witnesses admitted at trial was inadmissible hearsay which violated the Confrontation Clause under both *Roberts* and *Crawford*. The 60-1507 court ruled in relevant part:

> "7. The fifth issue raised was the claim that the hearsay evidence presented by the six listed witnesses should not have been presented under the guidelines set out in *Crawford v. Washington*, 541 U.S. [36], 158 L. Ed. 2d 177, 124 S. Ct. [1354 (2004)]. The hearsay nature of the testimony was dealt with on direct appeal to the Supreme Court of Kansas and found to be acceptable as set out in that opinion. That opinion was not appealed further.
>
> . . . .

"9. Where Mrs. Drach is unable to take the stand and be cross-examined, supposedly because she was dead at the hands of Roger Drach, such an equitable forfeiture of the Confrontation Clause is found to be proper. Under that evaluation, the reliance on the *Crawford* case would not be justified.

. . . .

"2. The hearsay nature of the testimony of Lana Christensen, Carol Taylor, Janet Meyers, Marvelle Darough, Marvelle Sosa and Dora Hermosillo was raised on direct appeal and the Supreme Court of Kansas found that such testimony was proper. The objection on hearsay testimony is by its nature, an objection on the basis of the right to confront one's accuser. To that extent, the Court finds that res judicata should apply to this argument. If the Supreme Court chooses to use the petition under K.S.A. 60-1507 as the vehicle to reverse itself, this Court feels it has the power to do so. Until then, this Court rules that the application must fail due to the fact that it has already been ruled on.

"3. The State argues that Mr. Drach failed to preserve the Confrontation Clause as a basis for the original appeal. This Court disagrees and rules that the issue was originally preserved and ruled on by the Supreme Court.

"4. The State further argues that *Crawford* should **not** be applied retroactively. This Court agrees that it should not, and that based upon *Brown v. Uphoff*, 381 F.3d 1219 (1st Cir. N.H.) August 19, 2004, and other reasoned authority, the decision of *Crawford* should NOT be retroactively applied.

> "5. The *Crawford* case applies only to evidence that is testimonial in nature. Under the definitions as applied in *Evans v. Luebbers*, 371 F.3d 438 (8th Cir. MO) June 10, 2004, the testimony of the [six] witnesses complained of by Mr. Drach would not be deemed testimonial in nature and therefore not excluded under the ruling of the *Crawford* case."

Discussion

"The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him or her. This constitutional provision does not preclude the admission of all out-of-court statements. In determining the admissibility of hearsay exceptions, the court must also consider the requirements of the Confrontation Clause of the United States Constitution. The Confrontation Clause can operate to bar the admission of evidence that would otherwise be admissible under an exception to the hearsay rule if confrontation requirements are not met." *State v. Lackey*, 280 Kan. 190, Syl. ¶ 1, 120 P.3d 332 (2005), *cert. denied* 126 S. Ct. 1653, 164 L. Ed. 2d 399 (2006).

At the time of trial in this case, a Confrontation Clause analysis was based on the United States Supreme Court's decision in *Roberts*. This court described the *Roberts* analysis in *State v. Bailey*, 263 Kan. 685, 692-93, 952 P.2d 1289 (1998) (quoting *Bratt*, 250 Kan. 264, Syl. ¶ 1, 824 P.2d 983 [1992]):

> "'The Confrontation Clause operates in two ways when determining the admissibility of hearsay statements. First, the Sixth Amendment establishes a rule of necessity. In the usual case,

> the prosecution must either produce or demonstrate the unavailability of the declarant whose statement it wishes to use against the defendant. Second, once a witness is shown to be unavailable, the witness' statement is admissible only if it bears adequate indicia of reliability. Reliability can be inferred where the evidence falls within a firmly rooted hearsay exception. If the evidence does not fall within a firmly rooted hearsay exception, the evidence must be excluded absent a showing of particularized guarantees of trustworthiness.' (Emphasis added.)" 263 Kan. at 692-93.

However, after the direct appeal in this case, the United States Supreme Court in *Crawford* substantially altered the Confrontation Clause analysis expressed in *Bailey* and *Roberts*. See *State v. Meeks*, 277 Kan. 609, 613-14, 88 P.3d 789 (2004). In *Crawford*, the Court drew distinctions between testimonial and nontestimonial hearsay evidence, holding:

> "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' [constitutional] design to afford the States flexibility in their development of hearsay law – as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations." 541 U.S. at 68.

Drach argues on appeal that the marital discord evidence should not have been admitted as res gestae or under the judicially created marital discord exception. He contends the admission of this hearsay evidence violated his rights under the Confrontation Clause under both *Roberts* and *Crawford*. The State offers several alternative arguments in response: (1) res judicata applies as this argument was raised on direct appeal; (2) *Crawford* is not retroactively applied in collateral appeals; (3) the marital discord testimony was not testimonial under *Crawford*; (4) Drach has forfeited his right to confrontation by killing the victim; (5) the erroneous admission of this evidence under *Crawford* was harmless error. The State's first two arguments resolve this case, although we consider them in reverse order.

Retroactivity of *Crawford v. Washington*

As discussed above, the United States Supreme Court concluded in *Crawford* that *Roberts* should no longer be used when conducting a Confrontation Clause analysis concerning testimonial hearsay. While the Kansas appellate courts have applied *Crawford* to cases pending on direct appeal, we have yet to consider whether it applies to collateral proceedings. See *e.g., State v. Corbett*, 281 Kan., 130 P.3d 1179 (2006) (applying *Crawford* on direct appeal); *Payton v. State*, No, 92,435, unpublished opinion filed December 9, 2005, *rev. denied* 281 Kan. (May 10, 2006) (panel did not reach retroactivity of *Crawford* where conviction would be upheld regardless of whether *Crawford* applied).

The State argues that *Crawford* does not apply retroactively to collateral proceedings. Contrary to Drach's

assertions on appeal, the 60-1507 court in this case agreed with the State: "The State further argues that *Crawford* should not be applied retroactively. This Court agrees that it should not, and that based upon *Brown v. Uphoff*, 381 F.3d 1219 ([10th Cir.]) August 19, 2004, and other reasoned authority, the decision of *Crawford* should NOT be retroactively applied."

In *Gaudina v. State*, 278 Kan. 103, 105, 92 P.3d 574 (2004), we set forth the following analysis to be used in determining whether a change in the law should be applied retroactively in collateral proceedings:

> "Kansas appellate courts have applied a three-step analysis for determining whether a change in the law should be applied retroactively in a criminal case under collateral attack. First, the court must determine whether the movant has properly raised the issue in his or her collateral attack. Supreme Court Rule 183(c) limits the issues that may be raised in a collateral attack. . . . Second, the court determines whether the case was final when the new law was established. . . . If a case was final when the new law was established, the general rule is that the new law will not be applied to cases on collateral attack. [Citation omitted.] Third, if the case was final before the new law was established, the court must determine whether any exception to the general rule against retroactive application applies."

In this case, the question of whether *Crawford* applies retroactively is properly brought in a K.S.A. 60-1507 motion and the *Crawford* opinion filed in 2004 was clearly decided well after the direct appeal was final in 2000. As such, we turn our attention to whether any exception to the general rule against retroactive application applies.

"Under *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989), a new rule of constitutional criminal procedure is not applied retroactively on collateral review unless (1) it places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prosecute, or (2) it is a watershed rule requiring the observance of those procedures that are implicit in the concept of ordered liberty." *Whisler v. State*, 272 Kan. 864, Syl. ¶ 1, 36 P.3d 290 (2001), *cert. denied* 535 U.S. 1066, 122 S. Ct. 1936, 152 L. Ed. 2d 841 (2002).

In this case, Drach's argument focuses on whether *Crawford* should be applied retroactively under the second *Teague* exception.

In *Schriro v. Summerlin*, 542 U.S. 348, 352, 159 L. Ed. 2d 442, 124 S. Ct. 2519 (2004), the United States Supreme Court further provided:

> "New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of '"watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding.' *Saffle, supra*, at 495 (quoting *Teague*, 489 U.S., at 311 (plurality opinion)). *That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is seriously diminished.' Id.*, at 313 (emphasis added). *This*

> *class of rules is extremely narrow, and 'it is unlikely that any . . . "ha[s] yet to emerge.'"* *Tyler v. Cain*, 533 U.S. 656, 667, n.7 121 S. Ct. 2478, 150 L. Ed. 2d 632 (2001) (quoting *Sawyer v. Smith*, 497 U.S. 227, 243, 110 S. Ct. 2822, 111 L. Ed. 2d 193 (1990))." (Emphasis added.)

The United States Supreme Court has thus established a strict standard for whether a new rule meets the second *Teague* exception; the emphasized statements above in *Summerlin* suggests that it does not consider the previously decided *Crawford* decision to fall within this exception. Nevertheless, in *Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005), the sole case relied upon by Drach, the Ninth Circuit applied *Summerlin* and concluded that *Crawford* was retroactive, reasoning in part:

> "Thus, at the heart of the Court's concerns in *Crawford* was the reliability of admitted evidence. Where admitted evidence is unreliable, the accuracy of convictions is seriously undermined. That the rule in *Crawford* is one without which the accuracy of convictions would be seriously undermined is further born out by the Court's own description of its prior doctrine as a 'rare case' of 'fundamental failure.' *Id*, at 1373. The difference between pre- and post-*Crawford* Confrontation Clause jurisprudence is not the sort of change that can be dismissed as merely incremental. Instead, it is an 'absolute prerequisite to fundamental fairness.' *Sawyer*, 497 U.S. at 244." *Bockting*, 399 F.3d at 1018-19.

In contrast, the great weight of the authority that has considered *Teague* and/or *Summerlin* has concluded that *Crawford* is not retroactive to collateral appeals. In *Brown v. Uphoff*, 381 F.3d 1219, 1226-27 (10th Cir. 2004), the Tenth Circuit found:

"Whether the rule of *Crawford* should be retroactively applied, therefore, depends on whether it meets one of the two exceptions articulated by the Court in *Teague*. Clearly, the first exception does not apply because *Crawford* does not place private conduct beyond the power of law-making authority to proscribe. We must examine then whether *Crawford* set forth a 'watershed rule' of criminal procedure. As we have noted before, this exception is narrowly defined. *Johnson v. McKune*, 288 F.3d 1187, 1197-98 (10th Cir. 2002). 'To qualify as a 'watershed' rule of criminal procedure, the rule must not only improve the accuracy with which defendants are convicted or acquitted, but also alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.' *Mora*, 293 F.3d at 1218-19 (quotation omitted). We conclude that the rule in *Crawford* does not meet this definition.

"It is true that in *Crawford* the Court referred to the protections of the Confrontation Clause as a 'bedrock procedural guarantee,' *Crawford*, 541 U.S. at 42, 124 S. Ct. at 1359, but that comment does not necessarily suggest that the rule set forth in *Crawford* is 'on the magnitude of the rule announced in *Gideon v. Wainwright*' as it must be to fit within the *Teague* exception. *See Mora*, 293 F.3d at 1219. Unlike *Gideon*, *Crawford* does not 'alter [] our understanding of what constitutes basic due process,' *Mora*, 293 F.3d at 1219, but merely sets out new standards for the admission of certain kinds of hearsay. Confrontation Clause violations are subject to harmless error analysis and thus may be excused depending on the state of the evidence at trial. *Crespin v. New Mexico*, 144 F.3d 641, 649 (1998). It would, therefore, be difficult to conclude that the rule in *Crawford*

> alters rights fundamental to due process. *See Mora*, 293 F.3d at 1219 (holding that *Apprendi v. New Jersey* did not alter fundamental due process rights, in part because *Apprendi* errors could be excused given overwhelming evidence). Accordingly, we conclude that *Crawford* is not a watershed decision and is, therefore, not retroactively applicable to Brown's initial habeas petition."

Several other circuits have rejected the argument that the accuracy of the convictions is seriously diminished by the failure to apply *Crawford*. For example, in *Mungo v. Duncan*, 393 F.3d 327, 335-36 (2d Cir. 2004), the Second Circuit held:

> "Assuming that *Crawford* announced a new rule, the question of its retroactivity turns, for our purposes, on whether the rule is necessary to the fundamental fairness, and improves the accuracy, of criminal proceedings. *Teague*, 489 U.S. at 311-14, 109 S. Ct. 1060. We do not believe that *Crawford* necessarily improves the overall accuracy of the criminal process. As we see the operation of the *Crawford* rule, it is likely to improve accuracy in some circumstances and diminish it in others. To the extent that *Crawford* requires the exclusion of unreliable hearsay that would have been admitted under the prior law, it is likely to improve accuracy. As the *Crawford* Court noted, courts applying *Roberts* were required to make 'amorphous' determinations whether hearsay statements bore 'particularized guarantees of trustworthiness,' and inevitably received unreliable evidence on that basis on some occasions. *Crawford*, 124 S. Ct. at 1370-72. Further, as Judge Weinstein observed below, not all hearsay statements that fit within firmly established exceptions to the hearsay rule are necessarily reliable. *Mungo*, 277 F. Supp. 2d at

184-85. Because *Crawford* bars the admission of testimonial statements that would have been countenanced by the old rules, and because some such evidence is unreliable, *Crawford* will in those instances improve the accuracy of the process.

"At the same time, however, *Crawford* also precludes admission of highly reliable testimonial out-of-court statements that would have been admissible under the old rules. In such instances, juries will be deprived of highly reliable evidence of guilt, and cases that otherwise would have resulted in well-deserved convictions will now result in acquittals or hung juries. We recognize that *Crawford's* rule derives from the principle that cross-examination is a better engine of truth-determination than a judge's assessment of the reliability of uncross-examined hearsay. *Crawford*, 124 S. Ct. at 1370. We do not question this principle. But it does not necessarily follow that the *Crawford* rule will improve the accuracy of the process. For the requirement of cross-examination will, in cases where the declarant is not available to be called for cross-examination, simply result in the exclusion of the testimony altogether. Where the testimony was admissible under the old rules precisely because it was reliable, these applications of *Crawford* will diminish, rather than increase, the accuracy of the process.

"[T]he advent of the *Crawford* rule brings about substantial changes in the protection given by the Confrontation Clause to an accused from receipt of uncross-examined statements. In some instances those changes will likely improve the accuracy of the fact-finding process; in others they will likely impair the accuracy of the fact-finding process. Because *Teague's* test of a watershed rule requires improvement in the accuracy of the trial

process overall, we conclude that *Crawford* is not a watershed rule."

Likewise in *Lave v. Dretke*, 444 F.3d 333 (5th Cir. 2006), the Fifth Circuit found the rule announced in *Crawford* does not implicate the fundamental fairness and accuracy of criminal proceedings reasoning:

> "Lave's argument [that the *Crawford* rule improves the accuracy of criminal proceedings because it excludes custodial statements by alleged accomplices unless the defendant has had a prior opportunity to cross-examine that alleged accomplice], however, does not show that the *Roberts* regime 'so seriously diminishe[d] accuracy that there [was] an impermissibly large risk of punishing conduct the law does not reach.' *Summerlin*, 542 U.S. at 355-56, 124 S. Ct. 2519 (internal quotations and citations omitted). Out-of-court testimonial statements were not indiscriminately presented to juries under the *Roberts* regime. Indeed, they were inadmissible unless they bore adequate 'indicia of reliability.' *Roberts*, 448 U.S. at 66, 100 S. Ct. 2531. Because only those statements that were deemed reliable could be admitted under *Roberts*, the fact that the class of statements as a whole is suspect does not demonstrate that *Roberts* created an impermissible risk of false conviction.
>
> "By its own terms, *Crawford* does not purport to announce a rule that increases the reliability of trial testimony. The opinion states, 'the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.' 541 U.S. at 61, 124 S. Ct. 1354.

> "As other circuits have held, the rule announced in *Crawford* does not assure greater accuracy because it bars admission of a statement to which it applies even when the statement is highly reliable. . . .
>
> "The rule announced in *Crawford* does not implicate the fundamental fairness and accuracy of criminal proceedings. While it may implicate the core of the confrontation right, it is not a rule without which there is an impermissibly high risk of false conviction." 444 F.3d at 335-36.

Additionally, the First, Sixth, Seventh, Eighth, and Eleventh Circuits have also either held or suggested that *Crawford* should not be applied retroactively. See *Espy v. Massac*, 443 F.3d 1362, 1367 (11th Cir. 2006) ("Although the rule announced in *Crawford* also impacts the accuracy of criminal convictions, it does not qualify as a 'watershed' rule in the mold of *Gideon*. *Crawford* merely altered the existing regime outlined by *White*, 502 U.S. at 355-56, 112 S. Ct. at 742-43, and *Roberts*, 448 U.S. at 65, 100 S. Ct. at 2539."); *Murillo v. Frank*, 402 F.3d 786, 790-91 (7th Cir. 2005) ("The point of *Crawford* is not that only live testimony is reliable, but that the sixth amendment gives the accused a right to insist on live testimony, whether that demand promotes or frustrates accuracy. . . . This is not an indispensable innocence-protecting decision that must be applied retroactively to criminal prosecutions that have already been finally resolved on direct review."); *Dorchy v. Jones*, 398 F.3d 783, 788 (6th Cir. 2005) ("Under most circumstances, however, newly promulgated rules of criminal procedure do not apply retroactively to cases on collateral review. . . . *Teague* thus prohibits Dorchy from availing himself of the new rule articulated in *Crawford*."); *Evans v. Luebbers*, 371 F.3d 438, 444 (8th Cir. 2004) ("[T]he *Crawford* Court did not suggest that this doctrine

would apply retroactively and the doctrine itself does not appear to fall within either of the two narrow exceptions to *Teague v. Lane's* non-retroactivity doctrine."); *McGonagle v. United States*, 137 Fed. Appx. 373, 380 (1st Cir. 2005) (unpublished opinion) ("It is doubtful that *Crawford* applies retroactively to cases on collateral review.").

For a number of reasons, we agree with the majority of the circuit courts which have considered this issue. First, the general rule is that a new law established after a case is final will not be applied to cases on collateral attack. *Gaudina*, 278 Kan. at 105. Second, we view the United States Supreme Court's statement in *Summerlin* after *Crawford* was decided as strongly suggesting that the *Crawford* decision does not fall under the second *Teague* exception: "This class of rules is extremely narrow, and '*it is unlikely that any . . . "ha*[*s*] *yet to emerge.*'" [Citations omitted.]" (Emphasis added.) 542 U.S. at 352.

Third, the United States Supreme Court has repeatedly declined invitations to treat one or another decision as a "watershed rule." For example, *Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442, holds that *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), is not retroactive on collateral attack, and we agree with the Seventh Circuit's observation that *Apprendi* is "surely a more sweeping change than *Crawford* (and more important to defendants, too, because it entitles them to a jury decision, while *Crawford* affects only what evidence the jury hears)." *Murillo v. Frank*, 402 F.3d 786, 790 (7th Cir. 2005). We have likewise found that *Apprendi* is not a watershed rule of criminal procedure that implicates the fundamental fairness of trial. See *Whisler*, 272 Kan. at 879.

Finally, the above case law persuasively demonstrates that *Crawford* is not a watershed rule of criminal procedure

implicating the fundamental fairness and accuracy of the criminal proceeding. Although the Ninth Circuit questioned the reliability and accuracy of the conviction prior to *Crawford*, the other circuits persuasively point out that reliability of the evidence in either *Roberts* or *Crawford* is simply tested in different ways, *i.e.*, by a finding that the evidence bore an "adequate indicia of reliability" or by opportunity for cross-examination. While application of *Crawford* may improve the accuracy of convictions in some instances by providing the opportunity to cross-examine a witness, *Crawford* might diminish the accuracy of a conviction in the case where evidence is highly reliable but excluded because it was not subject to cross-examination. For all of the above reasons, we conclude that *Crawford's* new rule is not a watershed rule entitled to retroactive application. Thus, Drach's remaining arguments applying the *Crawford* analysis are moot.

Res Judicata/*Roberts*

As *Crawford* is not retroactively applicable to Drach's case on collateral review, Drach alternatively argues that the marital discord evidence in this case was inadmissible hearsay. He contends the admission of this evidence as either res gestae or under the judicially created marital discord hearsay exception violated the Confrontation Clause under the law in effect at the time of trial, *Ohio v. Roberts*, 448 U.S. 56, 100 S. Ct. 2531, 65 L. Ed. 2d 597.

In this 60-1507 motion, Drach raises the exact same issue that was resolved by this court on his direct appeal.

On direct appeal, Drach raised the following issue:

> "Drach argues [in his direct appeal] that evidence of his prior bad acts was erroneously

admitted at trial. This evidence consisted of statements Deanne made to others about beatings she had suffered at the hands of Drach and also testimony from others who saw bruises and cuts on Deanne. Drach argues that Deanne's statements were inadmissible hearsay and that the other testimony was inadmissible evidence of prior bad acts." 268 Kan. at 648.

We rejected his argument, reasoning:

"Although the trial court admitted the evidence on the basis of res gestae, the evidence was admissible on other independent grounds. Kansas courts have consistently allowed evidence of 'marital discord' in cases similar to this. Evidence of marital discord can include several types of evidence: Oral and written statements made by the deceased spouse relating their abuse; evidence of scarring, bruising, bleeding, and other physical manifestations of the abuse; testimony by others who saw the couple fighting, arguing, or otherwise in conflict; and statements by the defendant relating that he or she will kill his or her spouse. This testimony may fall under the traditional notion of hearsay or evidence of prior bad acts, yet still be admitted." 268 Kan. at 648-49.

After citing numerous marital discord cases which allowed marital discord evidence independent of the "prior bad acts" exclusion or a "hearsay" exclusion, we concluded:

"Hearsay statements made by a deceased spouse-declarant are admissible as evidence of marital discord if the trial court finds that the statements have particular guarantees of trustworthiness. See *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980).

. . . .

> "Drach argues res gestae evidence is violative of the Confrontation Clause of the United States Constitution. The evidence complained of is admissible under the marital discord exception. Drach's argument under this issue is moot. The evidence was admissible, and the trial court did not abuse its discretion in allowing the evidence of marital discord." 268 Kan. at 651.

Based upon our resolution of this issue on Drach's direct appeal, the State argues that the doctrine of res judicata applies to the same issue Drach now raises in his 60-1507 motion:

> "Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived. Where a defendant's claim has not been raised at trial or on direct appeal, such a default prevents the defendant from raising the claim in a second appeal or a collateral proceeding." *State v. Neer*, 247 Kan. 137, 140-41, 795 P.2d 362 (1990).

Drach does not dispute that the issue of whether the hearsay was improper under *Roberts* was decided by the court on direct appeal. Rather, Drach seeks to have this court revisit the issue by suggesting in his brief that the "law of the case" doctrine rather than res judicata should apply: Under this doctrine, issues already decided by this Court on appeal "should not be relitigated or reconsidered unless [they are] clearly erroneous or would cause manifest injustice." *State v. Collier*, 263 Kan. 629, Syl. ¶ 3, 952 P.2d 1326 (1998). Drach argues that this court's decision

on direct appeal was clearly erroneous and imposed a manifest injustice on him.

The problem with Drach's argument is that he omits a critical portion of the "law of the case" doctrine in his argument:

> "When a second appeal is brought to this court *in the same case*, the first decision is the settled law of the case on all questions involved in the first appeal, and reconsideration will not normally be given to such questions. Ordinarily, under the law of the case doctrine, once an issue is decided by the court, it should not be relitigated or reconsidered unless it is clearly erroneous or would cause manifest injustice." (Emphasis added.) *Collier*, 263 Kan. 629, 952 P.2d 1326. Syl. ¶ 3.

See also *In re Cullen*, No, 91,735, unpublished opinion filed December 17, 2004 (law of the case doctrine not applicable to same issues raised in the second separate case).

The law of the case doctrine is thus inapplicable to this case where the appeal stems from a K.S.A. 60-1507 civil proceeding, which is a separate case from the criminal proceedings considered by this court on direct appeal in 2000. Drach raised virtually identical arguments in his direct appeal, and he has not shown why any of his new arguments concerning hearsay or *Roberts* could not have been raised on direct appeal. See Supreme Court Rule 183(c)(3) (2005 Kan. Ct. R. Annot. 228) (a K.S.A. 60-1507 motion cannot be used as a substitute for a second appeal, absent a showing the trial error affected constitutional rights and a showing of exceptional circumstances). In fact, Justice Six referenced the marital discord exemption

law review article in his concurring opinion that Drach now relies upon in his hearsay argument in this appeal. 268 Kan. at 651-52. Although Drach now claims that the district court never found on the record that the statements carried with them a particularized degree of trustworthiness under *Roberts*, the trial court is presumed to have made all necessary factual findings to support its judgment in the absence of an objection to inadequate findings. *State v. Combs*, 280 Kan. 45, 50, 118 P.3d 1259 (2005).

Conclusion

We conclude that the factual underpinnings of the district court's decision are supported by substantial competent evidence. Based upon our independent appellate review of the district court's denial of Drach's K.S.A. 60-1507 motion, we further conclude that the order of denial was legally correct and supported by the district court's factual findings. We therefore affirm the decision of the district court. Our decision renders Drach's remaining arguments moot.

Affirmed.

IN THE DISTRICT COURT
OF FINNEY COUNTY, KANSAS

ROGER DRACH	PLAINTIFF
-VS-	CASE 04CV152
LOUIS BRUCE AND STATE OF KANSAS	DEFENDANTS

DECISION DENYING K.S.A.60-1507 CASE

(Filed Nov. 15, 2004)

NOW ON THIS 22ND DAY OF OCTOBER, 2004, the above matter is before the Court for an evidentiary hearing. Plaintiff appears in person and with Dennis Owens. Max Estes appears to introduce Mr. Owens to the Court. The Defendants appear through Lois Malin, Assistant Finney County Attorney.

The Court rules that the Motion of the Plaintiff to amend his petition to add issues under the Supreme Court case of *Crawford vs. Washington*, should be allowed over the objection of the Defendants. After opening statements, witnesses were called in the persons of Roger Drach, Rick Marquez and John Lindner. After hearing the evidence, listening to the argument of counsel, and taking into account the limited and relevant portions of the record of 96Cr421 out of Finney County, the Court finds and rules as follows:

1. That the Plaintiff cites 5 reasons that the Court should find that the Plaintiff (Defendant in the Criminal Case), was subject to ineffective assistance of counsel.

2. In evaluating ineffective assistance of counsel, the test to be applied by the Court is reflected in Sanders v. State, 26 Kan App. 2nd, 826, 828. *"A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and second that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial."* (Quoting *St. v. Brown,* 266 Kan. 563 and *Chamberlain v. State,* 236 Kan. 650.)

3. The first claim of the Plaintiff is that he was not informed of his right to make the decision to testify or not, during the trial. The evidence is overwhelming that he was told on numerous times that it was his decision and he chose not to testify.

   A. During the Arraignment, the Journal Entry and the statement of Defense Counsel both confirm that Mr. Drach was told that "He has the right to testify, but only if he/she so desires."

   B. Both defense counsel confirmed that Mr. Drach was told of his right to make the decision and that both stated that it was his decision, after consulting with his attorneys that he would not do so.

   C. That at the conclusion of the defense's case, the Court inquired of the Defendant, Mr. Drach, as follows:

      "The Court: Mr. Drach, do you understand that you have the Fifth Amendment privilege against self-incrimination, and that's your decision alone whether you wish to testify. And you've made that decision; is that correct sir?"
      "Roger Drach: Yes, sir."
      "The Court: and it's your desire, then not to testify in this matter?"

"Roger Drach: Yes, sir." (Page 101, Transcript of Trial, XVI)

4. The second issue raised on the question of ineffective assistance of Counsel is a claim that the Defense attorney, failed to object to the prejudicial hearsay of Lana Christensen that reported the comment of the deceased that "Roger shot me before." The attorney for the state pointed out that this comment was the subject of a Motion in Limine prior to the trial and that during the start of this witness's testimony, an objection was lodged that was continuing in nature that renewed the objection as ruled on in the Motion. This allegation appears to not be bourne out by the facts in the official record.

5. The third issue raised was on a claim that Defense Counsel failed to propose a lesser included offense instruction to first degree murder. The Plaintiff failed completely to support this claim by any assertion of fact, including any reference to the record, and the Court must hold that this allegation is unsupported and therefore denied.

6. The fourth issue raised was in the failure of Defense Counsel to call Leah Kathman to bolster the position of the Defense in the criminal trial that the marriage of the deceased and Roger Drach, was on solid footing and mutually supportive. No evidence was presented that the testimony of Ms Kathman would add significantly to anything the other 12 witnesses called at trial and such trial strategy was not shown to be prejudicial to the outcome of the case. With 98 potential witnesses, obviously some decisions were necessary to limit the testimony to just those witnesses important to present the defense's theory of the case.

7. The fifth issue raised was the claim that the hearsay evidence presented by the six listed witnesses should not have been presented under the guidelines set out

in *Crawford vs. Washington,* 541 U.S.___, 158 L Ed 2d 177, 124 S Ct.___. The hearsay nature of the testimony was dealt with on direct appeal to the Supreme Court of Kansas and found to be acceptable as set out in that opinion. That opinion was not appealed further.

8. The U.S. Supreme Court notes on page 199 of the Lawyers Edition report of the case, that: "In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. . . ."

9. Where Mrs. Drach is unable to take the stand and be cross-examined, supposedly because she was dead at the hands of Roger Drach, such an equitable forfeiture of the Confrontation Clause is found to be proper. Under that evaluation, the reliance on the *Crawford* case would not be justified.

10. Attorney for the State has submitted with the Court's permission a proposed list of findings of fact and conclusions of law. For purpose of expanding and ruling on the issue raised by the case of *Crawford vs. State of Washington,* 124 S. Ct. 1354 (2004), the Court adopts those additional proposed findings of fact as set out in the "State's Proposed Finding of Facts and Conclusions of Law" filed on October 29, 2004 and listed 1 through 18.

11. That in addressing the proposed Conclusions of Law suggested by the State, the Court rules as follows:

    1. That in his filing on November 5, 2004, the Amended Motion Attacking Sentence sufficiently sets out the basis for a request for relief under K.S.A. 50 [sic]-1507 and the Court

does have Jurisdiction to deal with the matter. The Court notes the objection of the State to the Amended Motion which added the *Crawford* case argument.

2. The hearsay nature of the testimony of Lana Christensen, Carol Taylor, Janet Meyers, Marvelle Darough, Marvelle Soza and Dora Hermosillo was raised on direct appeal and the Supreme Court of Kansas found that such testimony was proper. The objection on hearsay testimony is by its nature, an objection on the basis of the right to Confront one's accuser. To that extent, the Court finds that res judicata should apply to this argument. If the Supreme Court chooses to use the petition under K.S.A. 60-1507 as the vehicle to reverse itself, this Court feels it has the power to do so. Until then, this Court rules that the application must fail do [sic] to the fact that it has already been ruled on.

3. The State argues that the Mr. Drach failed to preserve the Confrontation Clause as a basis for the original appeal. This Court disagrees and rules that the issue was originally preserved and ruled on by the Supreme Court.

4. The State further argues that Crawford should **not** be applied retroactively. This Court agrees that it should not, and that based upon *Brown vs. Uphoff,* 381 F.3d 1219 (1st Cir. (N.H.) August 19, 2004, and other reasoned authority, the decision of Crawford should NOT be retroactively applied.

5. The *Crawford* case applies only to evidence that is testimonial in nature. Under the definitions as applied in *Evans vs. Luebbers,*

> 371 F.3d 438 (8th Cir. (Mo) June 10, 2004, the testimony of the 6 witnesses complained of by Mr. Drach would not be deemed testimonial in nature and therefore not excluded under the ruling of the *Crawford* case.

In light of the above, it appears that the fifth claim for relief under the basis set out in *Crawford,* must by [sic] denied and that the facts of case of State vs. Roger Drach do not justify a Court ORDER for Habeas Corpus relief. The Petition is **denied** and this Case is **dismissed.**

SUCH IS THE ORDER OF THIS COURT.

/s/ Michael Quint
Michael Quint, District Judge

Copy mailed to Lois Malin, Dennis Owens this 15th day of November, 2004.

STATE OF KANSAS, Appellee, v. ROGER DRACH, Appellant.

No. 80,691

SUPREME COURT OF KANSAS

268 Kan. 636; 1 P.3d 864; 2000 Kan. LEXIS 46

March 10, 2000, Opinion Filed

SUBSEQUENT HISTORY: As Modified April 18, 2000. Second Modification May 18, 2000.

PRIOR HISTORY: Appeal from Finney district court; CHARLES E. WORDEN, judge.

DISPOSITION: Affirmed.

SYLLABUS: SYLLABUS BY THE COURT

1. In prosecutions for homicide a deceased's declarations or threats indicating a suicidal disposition, if made within a reasonable time before his or her death, are not within the hearsay rule and are admissible unless the facts preclude the possibility of suicide.

2. When a trial court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law.

3. The authority of an attorney begins with his or her retainer; but the relation of attorney and client is not dependent on the payment of a fee or a formal contract. The contract may be implied from the conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his or her profession.

4. The fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

5. Rebuttal evidence is limited to issues placed in conflict by the adverse party. The use and extent of rebuttal rests in the sound discretion of the trial court, and its rulings will not be reversed unless it appears the discretion has been abused to a party's prejudice.

6. Great deference is given to a trial court's determination of the admissibility of evidence. Generally, appellate review on questions of admissibility of evidence is governed by an abuse of discretion standard of review. Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable.

7. Kansas courts have consistently allowed evidence of marital discord in cases involving marital homicide. Evidence of marital discord can include several types of evidence: Oral and written statements made by the deceased spouse relating their abuse; evidence of scarring, bruising, bleeding, and other physical manifestations of the abuse; testimony by others who saw the couple fighting, arguing, or otherwise in conflict; and statements by the defendant relating that he or she will kill his or her spouse. This testimony may fall under the traditional notion of hearsay or evidence of prior bad acts, yet still be admitted.

COUNSEL: Jack Focht, of Foulston & Siefkin L.L.P., of Wichita, argued the cause, and Richard L. Marquez, of Lindner & Marquez, of Garden City, was with him on the brief for appellant.

Lois K. Malin, assistant county attorney, argued the cause, and John P. Wheeler, Jr., county attorney, and Carla J. Stovall, attorney general, were with her on the brief for appellee.

JUDGES: The opinion of the court was delivered by ABBOTT, J. SIX, J., concurring.

OPINION BY: ABBOTT

OPINION:

The opinion of the court was delivered by

ABBOTT, J.: This is a direct appeal by the defendant, Roger Drach, from his convictions for first-degree murder, aggravated battery, and criminal use of weapons. Drach's wife Deanne was the victim. Drach was sentenced to a minimum term of 25 years in prison.

Drach appeals, raising five issues. Drach argues the trial court erred when (1) it would not allow a board-certified psychiatrist to testify that a note found in the house was a suicide note; (2) it failed to find the assistant county attorney had a conflict of interest; (3) it allowed Karen Althaus to testify as a rebuttal witness for the State; (4) it admitted testimony of Drach's prior bad acts; and (5) it violated the Confrontation Clause of the United States Constitution by admitting res gestae evidence.

Deanne died on August 19, 1994, as a result of a gunshot wound to the chest. This case was not commenced until nearly 2 years after her death. The main issue at trial was whether Deanne had committed suicide or had been murdered by Drach.

Drach claimed Deanne committed suicide, that he was not in the room when she was shot, and that he found her on the bed after he heard the shot. The State's expert witnesses testified the wound could not have been self-inflicted. Drach's expert witnesses testified they were 99.5% certain the wound was self-inflicted.

Drach does not challenge the sufficiency of the evidence. Thus, we need not review the evidence. We will set forth the facts of this case, however, as necessary in discussing the issues.

We take time to comment that Drach's statement of facts is not keyed to the record in many instances and when keyed it is a general cite such as pages 8-107, 149-180, 56-106, 3-39, 20-74, 5-123, 6-164, etc. By rule, we are allowed to assume there is no evidence in the record to support that part of the case that is not properly keyed to the record. Supreme Court Rule 6.02(d) (1999 Kan. Ct. R. Annot. 33).

After review of the extensive record (18 volumes, the longest of which is 291 pages), two relevant facts emerged: Deanne had an affair 28 years before her death, and she had been abused since her husband discovered the affair shortly after it occurred.

At trial, there was much hearsay evidence of abuse suffered throughout the 34-year-marriage, none of which is pinned down by time or date.

When Deanne's body was examined at the scene, she was on the bed in the southeast corner of the room. The gun that was used to shoot her was in the northwest corner of the room. The gun was a derringer. Both parties' experts testified the bullet had been fired from the top

barrel. Yet, the top barrel had a live round with a dented primer in it and an empty cartridge in the bottom chamber.

Both old and new blood stains consistent with Deanne's blood were found throughout the house, in Deanne's purse, in her clothing, and in Drach's car, which would indicate Deanne had been abused for a long period of time.

When Deanne's body was examined, she was lying in fresh blood but had dried blood on her arms and back. She had a 2.5 centimeter laceration on the back of her head that went to the bone, two black eyes, a laceration above the right eye, and bruises all over her body. X-rays revealed new fractures of the 9th, 10th, and 11th ribs.

Two autopsies revealed old fractures of the 7th, 10th, 11th, and 12th ribs on the right side; a healing fracture of the left ulna; a fracture of the right arm that had recently been refractured; and a gunshot wound to the left arm.

Drach gave accounts of what happened that did not appear to be accurate. For example, in discussing a broken window, Drach said he had to break into the house because he did not have his key. Law enforcement officers testified the window was broken from the inside out. Drach testified that Deanne had facial bruises when he checked her out of the hospital. Three witnesses testified, however, that Deanne had no visible marks on her when they last saw her, including the discharging nurse at the hospital.

Drach also said he thought Deanne was drinking again when she died. The autopsy report showed her blood alcohol concentration was .000. Drach also told officers

Deanne got her gun out of *her* car the day she was shot. Her car was in storage at Dodge City at all pertinent times and had been for some time.

I. WRITING

During trial, Drach sought to place Dr. Tim McBath, a board-certified psychiatrist, on the stand to give his opinion that a writing found on the dryer in the Drachs' home after Deanne's death was a suicide note. Outside the presence of the jury, the trial judge heard testimony offered by Drach to determine if Dr. McBath's testimony was admissible under the *Frye* test.

Dr. McBath testified he was frequently called upon to examine writings to determine if they were suicide notes (if the writer says he or she is going to commit suicide, it is classified as a suicide note), and to determine if the note is a cry for help or a person who is planning to commit suicide. In about one-half of the writings, Dr. McBath does not have the opportunity to examine or talk to the author of the writing. He also had reviewed hospital and medical records where Deanne had expressed a wish for death and had suicidal thoughts.

The trial judge thought it was a *Frye* issue and made a preliminary ruling that Drach had not shown a basis for his opinion as generally acceptable as reliable within the expert's particular scientific field. The trial judge was influenced by the fact that Dr. McBath stated that he had never testified in court as to his opinion whether a writing was a suicide note, whether the author of the writing was serious or merely calling for help, and he did not know of any doctor who had.

The trial judge then held that Dr. McBath's testimony would not be admitted in the absence of some evidence establishing that "scientific evidence is accepted in his area, that it has been admissible and received in other courts." The trial judge left the door open for additional evidence or citations. None were forthcoming.

Numerous courts have ruled on suicide notes and suicide threats. In *Powell v. Commonwealth of Kentucky,* 554 S.W.2d 386 (Ky. 1977), the court held:

"When suicide is the theory of defense the decedent's previous threats or attempts to kill himself are admissible for the same reason. As this court said in *Marcum v. Commonwealth,* 308 Ky. 740, 215 S.W.2d 846, 847 (1948), 'the great weight of authority is to the effect that in prosecutions for homicide the deceased's declarations or threats indicating a suicidal disposition, if made within a reasonable time before his death, are not within the hearsay rule and are admissible unless the facts preclude the possibility of suicide.' See Wigmore on Evidence (2d ed.), § 143, and annotation at 83 A.L.R. 434."

See IA Wigmore on Evidence §§ 143 and 144 (2d ed. 1983); *Ott v. State,* 160 Ala. 29, 49 So. 810 (1909); *State v. Kelly,* 77 Conn. 266, 58 A. 705 (1904); *Nordgren v. People,* 211 Ill. 425, 71 N.E. 1042 (1904); *Hall v. State,* 132 Ind. 317, 31 N.E. 536 (1892); *State v. Meyer,* 180 Iowa 210, 163 N.W. 244 (1917); *State v. Beeson,* 155 Iowa, 355, 136 N.W. 317 (1912); *State v. Cater,* 100 Iowa, 501, 69 N.W. 880 (1897); *Epperson v. Commonwealth,* 227 Ky. 404, 13 S.W.2d 247 (1929); *State v. Ilgenfritz,* 263 Mo. 615, 173 S.W. 1041 (1915); *Sharp v. State,* 115 Neb. 737, 214 N.W. 643 (1927); *People v. Gehmele,* 1 Sheld. 251 (N.Y. 1871); *State v. Prytle,* 191 N.C. 698, 132 S.E. 785 (1926); *Blackburn v. State,* 23

Ohio St. 146 (1872); *Crow v. State,* 89 Tex. Crim. 149, 230 S.W. 148 (1921).

A clear majority and nearly all cited jurisdictions hold that evidence of suicide is admissible as tending to show the decedent's state of mind. Although these cases do not address the exact issue raised in the present case, they do indicate that evidence of a suicide theory can be admitted and that the jury is capable of determining its validity and attaching the proper weight.

There are also courts which have allowed testimony from experts who have read the suicide note and determined the "insanity" of the decedent in an insurance context. See *Garmon v. General American Life Ins. Co.,* 624 S.W.2d 42, 45-46 (Mo. App. 1981) (affirming trial court's admission of testimony by expert who determined based upon a reading of the suicide note that decedent was insane at time of his death); *Friedeman v. State,* 215 Neb. 413, 339 N.W.2d 67 (1983) (holding expert could testify as to decedent's state of mind after examining language used in suicide note); and *Brooks v. Travelers Insurance Company,* 515 S.W.2d 821, 823-24 (Mo. App. 1974) (holding expert could testify that decedent was sane at time he wrote suicide note and took his life).

Experts can be used to testify whether a decedent committed suicide if they testify regarding whether a wound is self-inflicted. These types of cases are abundant. See, e.g., *People v. Cole,* 47 Cal. 2d 99, 301 P.2d 854 (1956) (allowing expert pathologist to testify whether victim shot herself after performing an autopsy on her, while noting that a number of jurisdictions allow evidence as to whether a wound could have been self-inflicted); *State v. Mattatall,* 603 A.2d 1098 (R.I. 1992) (holding trial court

did not err when it admitted testimony of assistant medical examiner who stated that, based on autopsy and investigation of scene of death, decedent died by act of homicide and not self-inflicted injury); and *State v. Richardson,* 158 Vt. 635, 603 A.2d 378 (1992) (allowing medical examiner to testify that victim died by homicide and not by suicide).

Here, the writing is described in a number of places in the record as being 12 pages in length. There is also an indication it may be two pages in length. The writing was introduced at trial, so it was read by the trial judge and jury. It is *not,* however, a part of the record on appeal.

A paragraph of the writing was read to the jury which stated:

"I'm sorry that it has come to this, Roger. Everyone was so glad to hear we were back together and could go on with our lives. Since we were . . . [unreadable portion] . . . but were really thrilled. You believed everything except me. I'm sorry you feel like I'm doing nothing but lying to you, but what I've told you is true. I can understand your feelings because of all the interference and lies by David and Dora, but I'm not lying to you. I do love you and really thought things had a chance with us when we left Wichita, but that was only wishful thinking. I'm sorry for this Roger, but I meant it when I said I'm scared. How many times have you said, just die and I wish you were dead? I'm a pretty low and Goddamned person, but if I grant the only wish you've asked of me, maybe at least you can get on with your life."

The above writing was part of a notebook. Drach was free to present the suicide defense to the jury and did so. It is impossible to have a meaningful review of this limited

issue without having all of the writing. Based on the record before us, Drach did not meet his burden of proof, and we cannot say reversible error occurred on this issue.

II. CONFLICT OF INTEREST

Drach claims that Robert Johnson, the assistant county attorney prosecuting this case as second-chair, was privy to confidential information significant to this case and that this created an inherent conflict of interest worthy of disqualification. Drach claims that he only became aware of the conflict when Althaus was called to testify on rebuttal. Drach had not remembered his involvement with Johnson until then. Drach made a motion for a mistrial when Karen Althaus was called to the stand to testify. He also moved for a new trial, arguing that Johnson should have been disqualified from second-chairing the case. Specifically, Drach claims that Johnson violated Kansas Rule of Professional Conduct (KRPC) 1.9 (1999 Kan. Ct. R. Annot. 329). The rule states:

"RULE 1.9 Conflict of Interest: Former Client

"A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known."

In *Lansing-Delaware Water District v. Oak Lane Park, Inc.,* 248 Kan. 563, 572, 808 P.2d 1369 (1991), we set forth the standard of review in attorney disqualification matters and stated:

"When the trial court has made findings of fact and conclusions of law, the function of an appellate court is to determine whether the findings are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law."

Our review of conclusions of law is unlimited. *Gillespie v. Seymour,* 250 Kan. 123, 129, 823 P.2d 782 (1991).

In disqualification matters which involve KRPC 1.9, the burden of proof is on the party alleging the violation. *Chrispens v. Coastal Refining & Mktg., Inc.,* 257 Kan. 745, 756, 897 P.2d 104 (1995); KRPC 1.9 Comment (1999 Kan. Ct. R. Annot. 329). In this case, the burden of proof is on Drach to show that a violation of KRPC 1.9 occurred and that Johnson should have been disqualified from assisting in the prosecution of the case.

Prior to coming to the Finney county attorney's office, Johnson was in private practice. In early 1996, Deb West, Deanne's sister, called Johnson seeking representation in Deanne's probate case. Johnson agreed to represent West and filed an answer to a petition to open Deanne's estate. The petition was dismissed because it had been improperly filed. Johnson did not perform any more work for West after the dismissal of the petition. On March 26, 1996, Johnson notified West that he would no longer be able to represent her in the probate matter as he had taken a job with the Finney county attorney's office. The parties agreed that at no time did Johnson expressly represent Drach. Drach did, however, speak with Johnson

over the phone on two occasions. The first phone call concerned Drach's guarantee of West's attorney fees. Drach called Johnson a second time to find out why the retainer was so high. Drach contends that during the second phone call he provided Johnson with confidential information which Johnson then used during the trial to convict Drach. Drach testified that he told Johnson:

"I related to him, because I was pretty upset about that damn David [Deanne's brother who was attempting to be named executor of the estate], what's he doing to us now. I said I've got 90-some people that signed papers that I didn't ever do anything to my Deanne. And now all at once, attorneys, attorneys and bills and bills.

. . . .

"I said, I've only had one infraction on my marriage about 25 years ago in Hutchinson, Kansas when we lived there. And that's the only infraction in my entire marriage that I really did have.

. . . .

"I said I only had one thing ever happen to me, and I used the word I think infraction, in my marriage in the 34 years I've been married to her, and that was in Hutchinson, Kansas. And there's 90-some people that has been talked to and they testified or will testify or sign note papers or whatever, I kind of glanced through, that they have never saw me hit Deanne, never this Mickey Mouse, not one bit of it."

Drach contends that the information relayed in the phone call to Johnson enabled Johnson to locate Althaus. Althaus testified at trial on rebuttal that her husband had an affair with Deanne approximately 25 years ago when

the Drachs lived in Hutchinson. Drach alleges that this testimony was pivotal to his conviction for the death of Deanne. Johnson testified that he had no recollection of the substantive content of either of his phone calls with Drach.

In order for KRPC 1.9 to apply to this case, there must be a determination that Johnson represented Drach. *Associated Wholesale Grocers, Inc. v. Americold Corp.*, 266 Kan. 1047, 1053, 975 P.2d 231 (1999). An attorney-client relationship can either be by express agreement or implied. 266 Kan. at 1053. Johnson expressly represented West, Drach's sister-in-law, in the probate proceedings surrounding Deanne's death. Although no formal attorney-client relationship was ever formed between Drach and Johnson, Drach may have divulged confidential information to Johnson during the course of the second phone call. The information, admittedly, is more than a little vague and its usefulness questionable. According to Drach's testimony, he never revealed anyone's name to Johnson who may have been involved in Deanne's affair, only that an "infraction" occurred when they lived in Hutchinson.

The question remains whether Drach and Johnson had an implied attorney-client relationship. In *Associated Wholesale Grocers, Inc.*, this court recently stated:

"'"The authority of an attorney begins with his retainer; but the relation of attorney and client is not dependent on the payment of a fee, nor is a formal contract necessary to create this relationship. The contract may be implied from conduct of the parties. The employment is sufficiently established when it is shown that the advice and assistance of the attorney are sought and received in matters pertinent to his profession."' [Citation omitted.]"

266 Kan. at 1053 (quoting 7 Am. Jur. 2d, Attorneys at Law § 136).

See also *Professional Service Industries, Inc. v. Kimbrell,* 758 F. Supp. 676, 682 (D. Kan. 1991) (noting that an attorney-client relationship begins when the client seeks and receives personal legal advice from an attorney). Drach did not believe that Johnson was his attorney. Drach did not call Johnson for the purposes of obtaining representation. Drach did not seek legal advice from Johnson. Drach's only purpose in calling Johnson was to discuss the retainer that West would be paying to Johnson in the probate litigation. Drach did not divulge any "confidential" or useful information. Drach testified it was common knowledge about town that his wife had an affair while the couple lived in Hutchinson. Drach testified that the county attorney's office knew about the affair before he had divulged the information to Johnson. Althaus called the county attorney after she read about trial testimony in a newspaper.

The comment to KRPC 1.9 states that "the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." KRPC 1.9, Comment (1999 Kan. Ct. R. Annot. 329).

We hold that Drach did not meet his burden in proving that an implied attorney-client relationship existed with Johnson. Because Drach and Johnson were never in an express or implied attorney-client relationship, there can be no violation of KRPC 1.9. Furthermore, even if Drach and Johnson were in a confidential relationship, the testimony by Drach reveals that nothing told to Johnson was confidential.

III. REBUTTAL EVIDENCE

Rebuttal evidence is limited to issues placed in conflict by the adverse party. *Enlow v. Sears, Roebuck & Co.*, 249 Kan. 732, 742, 822 P.2d 617 (1991). When determining whether rebuttal evidence should have been admitted during trial, our standard of review is an abuse of discretion standard. "The use and extent of rebuttal rests in the sound discretion of the trial court and its ruling will not be reversed unless it appears the discretion has been abused to a party's prejudice." *State v. Weigel,* 228 Kan. 194, Syl. ¶ 9, 612 P.2d 636 (1980). Judicial discretion is abused and will be overturned by an appellate court only when no reasonable person would take the view adopted by the trial court. *State v. Stallings,* 262 Kan. 721, Syl. ¶ 6, 942 P.2d 11 (1997).

Althaus' testimony was used to refute testimony presented in Drach's case in chief in which witnesses stated that they had never seen Drach act in a violent manner toward Deanne. The State produced Althaus who testified that she had seen Drach threaten Deanne's life and the life of Althaus and her husband some 25 years ago when they were living in Hutchinson.

This court has consistently held that prosecuting attorneys are not required to disclose or endorse names of rebuttal witnesses. *State v. Trotter,* 245 Kan. 657, 660, 783 P.2d 1271 (1989); *State v. Hunter,* 241 Kan. 629, 638, 740 P.2d 559 (1987); *Talley v. State,* 222 Kan. 289, 292, 564 P.2d 504 (1977). Because the purpose of a rebuttal witness is to refute testimony given in the case in chief, it would be hard to list rebuttal witnesses in advance, not knowing exactly what detailed testimony may be elicited during the case in chief.

Drach presented at least 12 witnesses during his case in chief who testified that they had never seen Drach act in any violent manner toward Deanne. The trial court allowed Althaus to testify, finding that her testimony was warranted to refute Drach's case in chief and to show that Drach had previously threatened Deanne's life and threatened to kill himself. Althaus testified that she and her husband were good friends of the Drachs and that one night Drach had come to the Althaus residence at 1 a.m., pounding on the door and holding a pistol to Deanne's head. Drach insisted that Althaus' husband admit that he had an affair with Deanne. Drach held the pistol to Deanne's head and made her swear on a Bible that she only had sex once during the affair. Althaus testified that Drach hit Deanne several times during this altercation. Drach threatened to kill Deanne. Drach ordered Deanne to call her parents, confess her affair, and tell them good-bye. Drach told his in-laws that if they wanted to see Deanne alive they would have to get to Hutchinson before 6 a.m.

Despite the fact that Althaus' testimony may have surprised Drach, the testimony is admissible, absent a showing of an abuse of discretion. Drach was aware of his own past and presumably would have remembered the significant events to which Althaus testified. Drach's trial strategy was to show that he had never been violent toward Deanne. A reasonable person would assume that the prosecution would try to refute that testimony. A minimal amount of questioning by Drach's attorneys should have revealed that Drach had previously held Deanne at gunpoint in the presence of the Althauses, even though the events occurred years ago. Furthermore, the record reveals that it was Althaus who contacted the State and not the other way around. Althaus contacted the

county attorney's office after the trial had begun and after she had seen an article concerning the trial in the newspaper. While a 25-year-old occurrence would ordinarily not be admissible, it is shown this event is a common theme causing problems throughout this marriage. We cannot say that the trial court abused its discretion in allowing Althaus to testify as a rebuttal witness.

Drach also argues that the State should have disclosed its intent to put Althaus on the stand pursuant to *Brady v. Maryland,* 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963). The United States Supreme Court in *Brady* held that due process rights are violated when the prosecution withholds evidence favorable to an accused which is "material either to guilt or to punishment." 373 U.S. at 87. Here, the evidence was not "favorable" and not of an exculpatory nature; thus, it does not fall within the ambit of *Brady.* This argument is without merit.

IV. PRIOR BAD ACTS

Great deference is given to a trial court's determination of the admissibility of evidence. Generally, appellate review on questions of admissibility of evidence is governed by an abuse of discretion standard of review. *State v. Lumley,* 266 Kan. 939, 950, 976 P.2d 486 (1999). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. *State v. Gardner,* 264 Kan. 95, 103-04, 955 P.2d 1199 (1998).

Drach argues that evidence of his prior bad acts was erroneously admitted at trial. This evidence consisted of

statements Deanne made to others about beatings she had suffered at the hands of Drach and also testimony from others who saw bruises and cuts on Deanne. Drach argues that Deanne's statements were inadmissible hearsay and that the other testimony was inadmissible evidence of prior bad acts.

Because Drach's brief lacks any reference to any specific testimony complained about concerning this issue, we must look to the brief submitted by the State for some assistance. The State's brief suggests what type of testimony that Drach may be complaining about. Approximately 2 months before her death, Deanne went to St. Catherine's Hospital in Garden City. Deanne was inebriated, barefoot, not wearing her broken glasses, and her hair was in disarray. Drach was arrested for domestic battery. Deanne told Family Crisis Services workers, who testified at trial, that Drach had threatened her life. They also testified that Deanne had related to them that Drach had often beat her over the years and had repeatedly threatened her life over an affair that she had over 25 years previous. Deanne also reported to the workers that she had suffered broken ribs and arms over the years. Deanne further told the workers that she had been shot in the shoulder by Drach on a previous occasion. The workers observed a scar on Deanne's shoulder. Deanne told the workers that Drach had forbid her from seeking medical attention for most of these injuries.

Deanne related the same facts to a counselor in Dodge City who testified at trial. The counselor testified that Deanne had told her about times when Drach hit her in the face, stomach, and arms.

Approximately 1 month before her death, Deanne was admitted to St. Joseph's Hospital in Wichita. A doctor testified that he noticed scars about her face and arms. Deanne told him that Drach had caused the scars.

Although the trial court admitted the evidence on the basis of res gestae, the evidence was admissible on other independent grounds. Kansas courts have consistently allowed evidence of "marital discord" in cases similar to this. Evidence of marital discord can include several types of evidence: Oral and written statements made by the deceased spouse relating their abuse; evidence of scarring, bruising, bleeding, and other physical manifestations of the abuse; testimony by others who saw the couple fighting, arguing, or otherwise in conflict; and statements by the defendant relating that he or she will kill his or her spouse. This testimony may fall under the traditional notion of hearsay or evidence of prior bad acts, yet still be admitted.

In *State v. Hedger,* 248 Kan. 815, 811 P.2d 1170 (1991), the defendant was convicted of killing his wife. On appeal, the defendant argued that the trial court erred when it admitted testimony relating prior acts of violence against his wife. The defendant had been arrested for beating his wife and kicking her in the face in one instance and had broken a van window while attempting to get at his wife in another. Despite the fact that the testimony consisted of prior bad acts of the defendant, the *Hedger* court held that the evidence was admissible and noted that Kansas appellate courts have "repeatedly held that evidence of a discordant marital relationship is admissible, independent of the statute, to show the ongoing relationship between the parties." 248 Kan. at 820.

In *State v. Taylor,* 234 Kan. 401, 673 P.2d 1140 (1983), the defendant objected to the introduction of his deceased wife's notebook which contained notes concerning their marital counseling and relating to how she felt when the defendant became outraged and angry. The trial court admitted the notes contained in the notebook. On appeal, the defendant argued that the evidence should not have been admitted as it was evidence of prior bad acts in contravention to K.S.A. 60-455. The *Taylor* court affirmed the trial court and noted that evidence of marital discord is admissible where a family relationship exists in order to show a continuing course of conduct between the parties or to corroborate the testimony of a complaining witness. The *Taylor* court stated:

"The rule in Kansas is that in a case of marital homicide, evidence of a discordant marital relationship and a wife's fear of her husband's temper is competent as bearing on the defendant's motive and intent. The court did not err in admitting into evidence Shirley Taylor's letters which contained statements of marital discord and her fear of the defendant's temper since they showed the relationship of the parties and their conduct in the relationship." 234 Kan. at 408.

In *State v. Wood,* 230 Kan. 477, 638 P.2d 908 (1982), the defendant attempted to keep out testimony from his deceased wife's mother which concerned a telephone conversation that she had with her daughter about 7 hours before her daughter was killed. A neighbor also testified that he had seen the defendant throw his pregnant wife to the ground and drag her into their bedroom while holding a loaded .22 caliber gun 4 months before her death. The neighbor testified that the defendant had told him that he was going to "blow his old lady's head off"

about 2 weeks before she died. All three types of testimony, the description of prior bad acts, the hearsay, and the statement by the defendant, were admitted at trial, and the ruling of the trial court was affirmed on appeal. The *Wood* court noted:

"It is the rule in Kansas that in a case of marital homicide, evidence of a discordant marital relationship, and of the defendant's previous ill treatment of his wife, including his prior threats to kill her, is competent as bearing on the defendant's motive and intent. [Citations omitted.] Clearly, evidence of prior threats showing that the defendant had the intent to kill his wife was relevant on the issue of defendant's intent as it existed at the time the homicide occurred. It was admissible independently of K.S.A. 60-455." 230 Kan. at 479-80.

For other cases allowing evidence of marital discord, independent of the "prior bad acts" exclusion or a "hearsay" exclusion, see *State v. Green,* 232 Kan. 116, 121, 652 P.2d 697 (1982) (allowing a witness to testify that defendant had thrown a hatchet at his wife and other evidence of marital altercations while noting that evidence of marital discord is admissible where used to show defendant's motive and intent); *State v. Fenton,* 228 Kan. 658, 667-68, 620 P.2d 813 (1980) (allowing testimony that deceased had sought court order for protective custody after defendant had thrown butcher knife at her; allowing testimony that deceased had told sheriff's wife that defendant had threatened her; and allowing testimony of psychiatrist who related that deceased had told him about her marital problems); *State v. Anicker,* 217 Kan. 314, 316, 536 P.2d 1355 (1975) (allowing testimony that relatives had often seen the deceased with black eyes and bruises all over her body; testimony that defendant would often

lose his temper with deceased; and testimony that defendant had threatened deceased's life while noting that "from early times" appellate courts have held evidence of marital discord is admissible when it has a bearing on intent of defendant); and *State v. Patterson,* 200 Kan. 176, 182, 434 P.2d 808 (1967) (allowing testimony that defendant had threatened his wife's life as evidence of marital discord as it had a bearing on defendant's motive and intent and noting that evidence was especially necessary since it was case of marital homicide).

Hearsay statements made by a deceased spouse-declarant are admissible as evidence of marital discord if the trial court finds that the statements have particular guarantees of trustworthiness. See *Ohio v. Roberts,* 448 U.S. 56, 65 L. Ed. 2d 597, 100 S. Ct. 2531 (1980).

V. CONFRONTATION CLAUSE

Drach argues res gestae evidence is violative of the Confrontation Clause of the United States Constitution. The evidence complained of is admissible under the marital discord exception. Drach's argument under this issue is moot. The evidence was admissible, and the trial court did not abuse its discretion in allowing the evidence of marital discord.

Affirmed.

CONCUR BY: SIX

CONCUR:

SIX, J., concurring: In section IV, the Prior Bad Acts portion of the opinion, the majority notes the trial court relied on res gestae in admitting certain testimony. I agree

with the majority's rejection of res gestae as a rationale for admission. I write separately in a continuing effort to encourage trial courts to analyze this type of evidence under K.S.A. 60-460, the approach intended by the legislature's codification of our evidentiary rules. See Arguello, *The Marital Discord Exemption to Hearsay: Fact or Judicially Legislated Fiction,* 46 Kan. L. Rev. 62, 113 (1997). Although Drach does not brief the specific testimony complained of, it may have been admissible under K.S.A. 60-460(d)(3). Res gestae, as an independent evidentiary concept, deserves a proper burial. See *State v. Edwards,* 264 Kan. 177, 203, 955 P.2d 1276 (1998) (Six, J., concurring).

IN THE SUPREME COURT

OF THE STATE OF KANSAS

JEREMIAH KIDWELL
7TH FL HARZFELD'S BLDG
1111 MAIN ST
KANSAS CITY MO 64105

CASE NO. 04-93654-AS

ROGER DRACH, APPELLANT,
V.
LOUIS BRUCE AND APPELLEES.
STATE OF KANSAS,

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING OR MODIFICATION BY ROGER DRACH.

CONSIDERED BY THE COURT AND DENIED. RESPONSE AND REPLY NOTED.

DATE: 09/19/2006.

CAROL G. GREEN
CLERK

Supreme Court, U.S.
FILED
FEB 15 2007
OFFICE OF THE CLERK

No. 06-789

IN THE

Supreme Court of the United States

ROGE.. DRACH,

Petitioner,

v.

LOUIS BRUCE AND THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Kansas

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), apply retroactively to cases on collateral review?

2. Did the admission of statements by volunteers and workers at a women's crisis center—whose testimony provided evidence of a discordant marital relationship between petitioner and the victim—violate the Confrontation Clause under the now-abandoned standard of *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004)?

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STATEMENT OF THE CASE

Respondents respectfully adopt the succinct statement of the case set forth in the opinion of the Kansas Supreme Court in this case. *See* Appendix to Petition for Writ of Certiorari ("Pet. App.") 5-9.

CERTIORARI CONSIDERATIONS

I. THIS COURT RECENTLY GRANTED REVIEW ON THE ISSUE OF WHETHER *CRAWFORD v. WASHINGTON* APPLIES RETROACTIVELY.

Petitioner maintains that this Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), created a watershed rule of criminal procedure and as a result should be applied retroactively to cases on collateral appeal. Pet. Br. 7-22. On May 15, 2006, this Court granted review on whether *Crawford* should be applied retroactively. *See Whorton v. Bockting*, 126 S. Ct. 2017 (2006). Petitioner acknowledges this fact in his petition. Pet. Br. 7.

The issue of *Crawford*'s retroactive application to cases on collateral review presented in *Bockting* is substantially similar to questions II and III in the petition for a writ of certiorari in this case. The sole difference between this case and *Bockting* is that this case arises from the Kansas Supreme Court's denial of state post-conviction relief under Kan. Stat. Ann. § 60-1507. Pet. App. 1-35.

Given the similarities, the Court should hold the petition in this case pending its decision in *Bockting* and dispose of this matter accordingly once a decision is reached in *Bockting*.

II. WHETHER KANSAS'S PERHAPS UNIQUE EXCEPTION FOR THE ADMISSION OF EVIDENCE OF MARITAL DISCORD VIOLATES THE SIXTH AMENDMENT DOES NOT WARRANT THIS COURT'S REVIEW.

Petitioner contends that in the event that *Crawford v. Washington*, 541 U.S. 36 (2004), is not applied retroactively, the decision by the Kansas Supreme Court addressing the "marital discord" exception ran afoul of the Confrontation Clause of the Sixth Amendment. His argument is both procedurally and substantively flawed.

A. THE KANSAS SUPREME COURT'S DECISION RELIES ON AN INDEPENDENT AND ADEQUATE STATE LAW GROUND.

The Kansas Supreme Court's decision to deny petitioner relief on his Sixth Amendment challenge to the marital discord exception rested squarely on an independent and adequate state law ground. Pet. App. 31-35. The lower court did not engage in the constitutional analysis requested by petitioner, but rather determined that he forfeited his right to re-litigate the issue on grounds of *res judicata*. *Id.* The Kansas Supreme Court observed that petitioner "[did] not dispute that the issue of whether the hearsay was improper under [*Ohio v.*] *Roberts* was decided by the court on direct appeal," (Pet. App. 33), and was seeking only to have the matter revisited under the "law of the case" doctrine. *Id.* The reasonable conclusion is that the lower court believed that petitioner was simply displeased with its prior ruling (Pet. App. 58-63) and improperly sought to resubmit the claim in his post-conviction appeal.

Thus, petitioner's challenge to the marital discord exception was rejected on a state law ground that was independent of the federal question and adequate to support the state court's judgment. *See Michigan v. Long*, 463 U.S. 1032, 1041-1042 (1983); *Durley v. Mayo*, 351 U.S. 277, 284-85 (1956) (*res judicata* generally constitutes an adequate

and independent state ground). Indeed, the Kansas Supreme Court's decision is plain regarding its disposition of the Confrontation Clause issue on direct appeal, and why it would not revisit the issue on collateral review. Pet. App. 31-35. In short, the lower court's decision denying relief was not based on Sixth Amendment jurisprudence, but on state law procedural grounds. *Id.* Consequently, this Court is without jurisdiction to review the first question presented in the certiorari petition. *Dretke v. Haley*, 541 U.S. 386, 393 (2004).

Petitioner suggests that this Court should ignore the lower court's independent and adequate resolution of this claim "[b]ecause [he] could not possibly have raised the issue of the marital discord exception's constitutionality on direct appeal."[1] Pet. Br. 24. His failure to directly raise the federal claim did not, however, foreclose his ability to continue to litigate this particular issue. Indeed, despite petitioner's assertion that he did not argue the claim, the lower court did consider the present constitutional issue on direct appeal, directly invoking *Ohio v. Roberts*, 448 U.S. 56 (1980), *overruled on other grounds*, *Crawford v. Washington*, 541 U.S. 36 (2004) ("Hearsay statements made by a deceased spouse-declarant are admissible as evidence of marital discord if the trial court finds that the statements have particular guarantees of trustworthiness.") Pet. App. 58-63;

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[1] Petitioner further invites the Court to second guess the Kansas Supreme Court's decision to employ the doctrine of *res judicata* arguing, in essence, that it so fundamentally misconstrued state law in this area that the decision cannot be considered an adequate state law ruling. Pet. Br. 24-27. Only in the rarest of cases should this Court seek to review an alleged error of state law—and this case presents no such circumstance. *Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (errors of state law are not the concern of the Court unless such error for some other reason rises to the level of a denial of a constitutional right).

see also Illinois v. Gates, 462 U.S. 213, 218 n.1 (1984) (noting that federal law is sufficiently drawn into question if the federal question "had been either raised or squarely considered and resolved in state court"). The issue today was drawn into question by the lower court and appropriately postured following petitioner's direct appeal. To that end, petitioner had the opportunity to seek certiorari from that decision, yet he failed to do so.

Even if petitioner did not directly argue the precise federal question during his direct appeal that he now presents, the issue was passed upon to the degree that it was available for this Court's certiorari review.[2] Petitioner chose not to pursue this claim while it was ripe, opting to present anew his claim in state post-conviction proceedings—an attempt that the Kansas Supreme Court rejected on state law procedural grounds. Petitioner's failure to seek certiorari review following his direct appeal is noteworthy and alone makes this petition an inappropriate vehicle by which to consider the marital discord exception.

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[2] In his brief on direct appeal (Resp. App. 1a-12a), petitioner submitted that the trial court erred in admitting the challenged statements as *res gestae*, an issue of Kansas law. Although petitioner focused his attention on the issue of *res gestae*, he made explicit reference to the Confrontation Clause and how it was violated as a result of the trial court admitting testimony of various witnesses. (Resp. App. 10a-11a). Petitioner submits that he could not have raised a Confrontation Clause challenge to the marital discord exception on direct appeal, in turn arguing that the lower court's employment of *res judicata* was therefore inappropriate. Pet. Br. 24. Petitioner's argument is not well-founded and is simply a distinction without a difference. Petitioner did challenge the statements on Sixth Amendment grounds, and the lower court rejected that argument. (Pet. App. 33, 63). Petitioner's successive attempt at challenging these statements as a violation of the Confrontation Clause should also be rejected by this Court.

From a substantive perspective, the decision below was eminently sensible. Under Kansas law, a challenge to a criminal conviction based upon the alleged improper admission of trial testimony introduced in violation of the Confrontation Clause is expected to be raised on direct appeal. *See Bruner v. State*, 88 P.3d 214, 218 (Kan. 2004) (trial errors affecting constitutional rights must be raised on direct appeal unless exceptional circumstances exist excusing the failure to present claims at that stage). On direct appeal, petitioner challenged the admission of the statements by the health professionals and the Kansas Supreme Court rejected his arguments. The decision to deny petitioner relief on procedural grounds during the collateral appeal was therefore reasonable as the Confrontation Clause issue, analyzed under *Roberts* had been resolved previously.

In sum, this Court lacks the necessary jurisdiction to review the question of whether Kansas's marital discord exception violates the Confrontation Clause of the Sixth Amendment. Consequently, the petition for writ of certiorari should be denied.

B. WHETHER KANSAS'S MARITAL DISCORD EXCEPTION VIOLATES THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT DOES NOT MERIT THIS COURT'S ATTENTION.

Independent of petitioner's retroactivity claim, and notwithstanding that his first question presented is not properly before this Court, the argument that Kansas's marital discord exception violates the Confrontation Clause of the Sixth Amendment lacks sufficient merit to justify this Court's attention. Petitioner submits that this appeal warrants review on grounds that the lower court's opinion is in conflict with *Roberts*, 448 U.S. 56, *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999). Pet. Br. 6. That

suggestion falls short of establishing any meaningful reason why this Court should grant his petition.

A decision in this case has no future implications and would only apply to a fleeting number of *past* Kansas cases given the Court's decision in *Crawford*, which altered the Confrontation Clause analysis in the context of hearsay evidence rules. Absent *Crawford*, petitioner's appeal would simply represent an everyday complaint against a state court's evidentiary ruling. Such evidentiary matters are routinely left to the states unless an appeal presents an issue of much broader interest. The petition here does not implicate any federal constitutional concern beyond petitioner's own conviction and the convictions of a very limited number of individuals whose trials in Kansas may have involved the admission of evidence involving a discordant relationship.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the petition or, in the alternative, hold the petition for resolution following the Court's decision in *Whorton v. Bockting*, 126 S. Ct. 2017 (2006).

Respectfully submitted,

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NO. 98-80691 S

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,
Plaintiff-Appellee,
vs.
ROGER DRACH,
Defendant Appellant.

BRIEF OF DEFENDANT-APPELLANT,
ROGER DRACH

[Excerpts of brief on direct appeal below]

* * * *

IV. THE COURT ERRED IN ALLOWING HEARSAY TESTIMONY OF PRIOR "BAD ACTS" OF THE DEFENDANT TOWARD THE DECEDENT.

"*Res gestae*" is a Latin term meaning "things done" which includes circumstances, facts and declarations incidental to the main fact or transaction. 29 AmJur 2nd, Evidence, §860. *Res gestae* evolved as a common law rule of evidence which permitted the introduction of out of court statements into evidence over a hearsay objection. The concept was abolished in the federal system with the enactment of the Federal Rules of Evidence which set forth with specificity those exceptions which were permissible despite the provisions of the hearsay rule. *Miller v. Keating*, 754 F.2d. 507, 509 (3rd Cir. 1985); *Stephens v. Miller*, 13 F.3d 998, 1003 (7th Cir. 1994). Similarly, after the Kansas legislature enacted rules of evidence for Kansas courts, the Kansas

Supreme Court held in 1970 that lingering common law doctrines like *res gestae* were abolished. *State v. Jones*, 204 Kan. 719, 466 P.2d. 283 (1970).

Despite the prohibitions enunciated by the Kansas Supreme Court in *State v. Jones*, *supra*, the Court has somehow deemed that *res gestae* evidence is admissible to allow a witness to testify what someone else said that yet a third person said without specific evidence concerning the circumstances of the making of the out of court statements. *State v. Gadelkarim*, 256 Kan. 671, 887 P.2d 88 (1994).

In short, the court's ruling regarding the inclusion of *res gestae* type evidence in a trial setting not only improperly amends the Kansas Rules of Evidence, but it also violates the confrontation clause of the United States Constitution. In a thoughtful article published in 65 J.K.B.A. (October, 1996) entitled "*Res Gestae Raises Its Ugly Head*", Professor Dennis D. Prater and Lieutenant Virginia M. Klemme analyze the problems created by the rebirth of *res gestae* in Kansas. In addition to the faults pointed out by defendant in this argument, the authors state without equivocation that "in the criminal context against the defendant, the court's *res gestae* analysis runs afoul of the confrontation clause." (P. 29)

Defendant submits that the debate over whether *res gestae* evidence is admissible was resolved in Kansas in 1963 when the legislature enacted the Kansas Rules of Evidence (K.S.A. 60-401 et. seq.) Specifically, K.S.A. 60-460(d)(1)(2) and (3) state:

> "Evidence of a statement which is made other than by a witness while testifying at the hearing, offered to provide the truth of the matter stated, is hearsay evidence and inadmissible except:
>
> (d) A statement which the judge finds was made (1) while the declarant was perceiving the event or condition which the statement narrates, describes or explains, (2) while the

> declarant was under the stress of a nervous excitement cause by such perception or (3) if the declarant is unavailable as a witness, by the declarant at a time when the matter had been recently perceived by the declarant and while the declarant's recollection was clear and was made in good faith prior to the commencement of the action and with no incentive to falsify or to distort."

It is important to note that (d)(1) and (d)(2) clearly illustrate that the Kansas legislature intended to limit *res gestae* type evidence solely to the present sense impression and excited utterance exceptions to the hearsay rule. This was noted by Judge Spencer Gard, Code of Civil Procedure Revision – Evidence, 31 J.B.A.K. 194, 198 in commenting on two expansions of the hearsay doctrine in the proposed rules of evidence (and what ultimately became K.S.A. 60-460(d)(3)):

> "The other one is an exception in subsection (d)(3), and that one would expand the scope of what we loosely call "*res jeste*" statements. In other words, spontaneous explanation or statements made while the witness was observing the thing about which he wants to testify. That could be expanded a little bit to include those borderline situations where the trial judge finds that the declaration, even though not strictly spontaneous, not strictly res jeste, nevertheless was made under circumstances which indicate that there could have been no incentive whatever on the part of the declarant misstating what he said."

The Court in *State v. Gadelkarim*, *supra*, obliterated the protections afforded by K.S.A. 60-460(d)(1)(2) and (3) and revived *res gestae* phraseology in order to permit the introduction of inadmissible hearsay evidence. In so doing, the Kansas Supreme Court has violated the confrontation clause of the United States Constitution.

In *Gadelkarim*, the defendant was charged with the murder of his girlfriend, Debra Cagle. The defendant and Ms. Cagle had had a stormy relationship. Prior to the murder, the defendant had been charged with indecent liberties with

one of Ms. Cagles's children. The defendant was convicted of indecent liberties on November 30, 1988. On December 3, 1988, Debra Cagle was found dead in her home and the defendant was charged with first-degree murder.

In order to meet its burden on the premeditation issue, the state offered the testimony of Christine Moline, a friend of Ms. Cagle. Ms. Moline testified that at some unknown time during the indecent liberties trial, Ms. Cagle told her (Ms. Moline) that the defendant had told Ms. Cagle if he had to go to prison he would kill himself and take others down with him.

The state also offered the testimony of Patricia Murphy, another friend of the victim. Ms. Murphy testified that Ms. Cagle had told her at some unspecified time that the defendant and Ms. Cagle had argued and further, that Ms. Cagle had received a red mark on her face in the heat of the argument. It is interesting to note that Ms. Moline was unable to provide specific evidence concerning the emotional status of Ms. Cagle when she conveyed the information to either witness. Nor was there any evidence presented concerning the time of any events in relation to the conversations.

The defendant was convicted and on appeal argued that the statements of Ms. Moline were inadmissible hearsay because they did not meet the requirements of K.S.A. 60-460(d)(3), the only possible statutory exception to hearsay that might apply to these statements. The Kansas Supreme Court was unable to find any applicable statutory exception to the hearsay rule, but nonetheless upheld the introduction of the evidence by employing the following *res gestae* analysis:

> *Res gestae* evidence is that evidence which does not constitute a portion of crimes charged but has a natural necessary, or logical connection to the crime ...

> *Res gestae* is a broader concept than an exception to the hearsay rule. It actually deals with admissibility of evidence of acts or declarations before, during or after happenings of the principal event. Those acts done or declarations made before, during or after the happening of the principal occurrence may be admitted as part of the *res gestae* where those acts or declarations are so closely connected with the principal occurrence as to form in reality a part of the occurrence. *State v. Sherry*, 233 Kan. 920, 667 P.2d 367 (1983). *Res gestae* includes those circumstances which are automatic and undersigned incidents of the particular litigated act, which may be separated from the act by lapse of time but are illustrative of such act. It is the whole of the transaction under investigation or being litigated and every part of it. Acts done or declarations made before, during, or after the principal occurrence may be admissible as part of the *res gestae* to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. *State v. Peterson*, 230 Kan. 821, 829, 696 P.2d 387 (1985).
>
> *State v. Gadelkarim*, *supra*, at 687-688.

Res gestae was never meant to establish such a position as set forth by the Kansas Supreme Court.

The court's language that *res gestae* in the hearsay setting is "evidence which has a logical connection to the crime" and is, therefore, admissible is grossly over broad and not historically justifiable. Further, the court's definition takes trustworthiness out of the equation. In short, the court's definition read literally and as applied in *State v. Gadelkarim*, contradicts the very purpose for the hearsay rule and the policy justifications for its exceptions to the rule. Plainly stated, hearsay is inadmissible because it is not trustworthy. The declarant is not available for cross examination, thus the declarant's ability to perceive the event and communicate information cannot be tested. Also, since the declarant is not before the finder of fact, the finder is not

able to determine the declarant's demeanor. For these reasons, hearsay has always been regarded with disfavor and held inadmissible.

Defendant further submits that the admission of *res gestae* evidence should be prohibited on the grounds that the admission of this type of evidence constitutes a substantive change of the law as opposed to a procedural change. Specifically, K.S.A. 60-402 sets out the scope of the rules. That section states:

> "Scope of rules. Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced." (Emphasis added.)

Neither the Kansas Rules of Civil Procedure, nor the Kansas Rules of Criminal Procedure even remotely mention *res gestae* evidence; nor does any other statute authorize the use of *res gestae* evidence. Therefore the admission of *res gestae* evidence creates a substantive change or modification of the Kansas Rules of Evidence and not a procedural change in the law. Hearsay exceptions are substantive and the trial court and the Kansas Supreme Court are therefore statutorily bound by the Kansas Rules of Evidence to apply the hearsay rule and its exceptions to any evidence that the State may seek to introduce at the time of trial.

In *State v. Clark*, 931 P.2d 664 (1997) the issue of admissibility of *res gestae* evidence was discussed by the Kansas Supreme Court. The court indicated that *res gestae* evidence is somehow admissible as evidence of other crimes and civil wrongs pursuant to K.S.A. 60-455, if such evidence passes judicial scrutiny under the provisions of K.S.A. 60-455 and K.S.A. 60-448. Both of these rules of evidence provide that such evidence may be admissible when relevant to prove some other material fact including motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Thus in *Clark*, *supra*, the state's theory for admission of *res gestae* evidence was that Clark killed Lynette (his girlfriend/fiancee) because he was angry that she wanted him to move out of their residence and further that he was allegedly jealous of her contacts with other men. Specifically, the state sought to admit evidence of the parties' discordant relationship. The Court further determined that the prior statements concerning the relationship of Clark and Lynette were relevant as they were indicative of motive, intent, and absence of mistake and were therefore admissible.

Defendant submits that the importance of the *Clark* decision is that the Kansas Supreme Court indicated that prior to the admission of prior bad acts/*res gestae* evidence as evidence of marital discord, there must be some nexus or connection in time between the date that the purported statements or acts allegedly occurred and the date the subsequent criminal acts (such as the alleged murder of Deanne Drach) occurred.

Defendant submits that a review of other Kansas cases where evidence of marital discord was allowed by the trial court indicates that upon appellate review the court also required some showing of closeness or proximity between the alleged marital discord and the subsequent criminal activity.

For example in *State v. Wood*, 230 Kan. 477 (1982), the court allowed the state to introduce testimony of the defendant's prior threats and criminal misconduct toward his wife as evidence of marital discord. Specifically, the witnesses testified that the defendant had problems controlling his temper and had been violent with his wife (the victim) on several occasions shortly before her untimely death. The testimony elicited during the trial indicated that Ms. Wood had planned to leave her husband, however she

did not because she was afraid that he would follow her and kill her and would not let her take their baby. Additionally, defendant had allegedly stated to a friend two to three weeks before the killing that he would "blow his old lady's head off." Finally, testimony was presented that on one prior occasion defendant had abused his wife while holding a loaded gun in his hand and that on the day before the homicide, he had been arguing with her and struck her.

It should be noted that in the *Wood* case, the date of death was December 8, 1979. On December 7, 1979, the victim had called her mother approximately seven hours before the crime occurred and advised her that she had been beaten by her husband and that he threatened to kill her. Defendant submits that the *Wood* case is important in that this court focused on the dates or times when the statements were made in relation to the proximity to the death.

Ironically, in the *Wood* case, the state did not attempt to elicit testimony from any of their witnesses of the history of the parties' discordant marital relationship.

A similar situation arose in *State v. Green*, 232 Kan. 116 (1982). In that case, defendant Green was convicted of first degree murder of his wife. Evidence of marital discord in the weeks preceding the victim's death was present including an instance where Green had threatened to send his wife back to Africa in a pine box. Neighbors testified that the victim was afraid of Green. (Emphasis added.) In *State v. Fenton*, 228 Kan. 658 (1980), the trial court allowed evidence of a discordant marital relationship between the defendant and the victim which consisted of the defendant's previous ill treatment of his wife, including his prior threats to kill her.

In *Fenton*, the state presented the testimony of LoVae Blounk. Mrs. Blounk was the sheriff's wife and occasionally assisted the sheriff as a matron. Mrs. Blounk testified that on February 10, 1975, she met the deceased, Mrs. Fenton, after the appellant sought a court order for protective custody. Apparently, the Fentons had become embroiled in a marital

dispute which climaxed when Mrs. Fenton threw a butcher knife at the appellant. Mrs. Blounk testified that she sat in on conversations between the Fentons and county judge and between the Fentons and the county medical officer. The focal point of Ms. Blounk's testimony was "Dr. Stucky told them that they could leave at which time Mrs. Fenton asked Norman if he was ready to go home and he said, 'Yes, but if this happens again, I'll kill you.'"

Mrs. Blounk further testified that Mrs. Fenton told Dr. Stucky that she and the defendant always threatened each other during arguments, but that they did not mean it. Mrs. Blounk testified with the aid of written notes which she had prepared in November of 1975, shortly after the murder of Mrs. Fenton on November 28, 1975.

Although the statements made by Mrs. Blounk were admitted nearly five years after the date of Mrs. Fenton's death, it should be noted that the defendant was not charged until approximately 1980 in the death of his wife. In determining or evaluating the liability of the statements, it was determined that as the notes of Ms. Blounk were prepared shortly after the victim's death, apparently the notes were reliable; therefore, the trial court allowed Mrs. Blounk to testify utilizing her notes. Once again, this court focused on the fact that the notes were prepared in relative close proximity to the murder that the witness was testifying to.

In this particular case, the state introduced evidence which covered the past twenty-four to thirty years of the defendant's marital relationship with his wife. Evidence was admitted of a highly generalized nature. Defendant submits that it was virtually impossible for him to present an adequate defense and confront witnesses when their testimony was based upon not only hearsay statements of the deceased, but arguably double and triple hearsay statements from other witnesses as well. Additionally, defendant submits that many of the decedent's statements or perceptions were provided to numerous witnesses while she

was severely intoxicated. (Several of the statements of key witnesses for the state verify that decedent was severely intoxicated at the time these statements were allegedly made. The second autopsy which was conducted in March 1997 also verified that the decedent had a terrible drinking problem, largely due to the condition of her liver.) In addition, there was evidence that decedent would retract an accusation when in a different mood or effect.

Defendant submits that the reliability and trustworthiness of these statements was highly suspect and, therefore, should not have been allowed. Finally, defendant had absolutely no effective manner in which to cross-examine any of the State's witnesses in regards to these "statements/ declarations" purportedly made by the alleged victim.

In *State v. Gadelkarim*, 256 Kan. 671 (1994) citing *State v. Sherry*, 233 Kan. 920, the court held that *res gestae* evidence concerns those acts done or declarations made before, during or after the happening of the principal occurrence and therefore may be admitted as part of the *res gestae* where those acts or declarations are so closely connected with the principal occurrence as to form a reality a part of the occurrence." The evidence which the State sought to introduce concerning the thirty-year marriage of the defendant was not in any way closely related to the charges of first degree murder or aggravated battery in this case. Therefore, in light of the rationale of the court in *State v. Gadelkarim*, the trial court should have excluded any and all evidence of marital discord unless the State could have presented evidence that displayed some closeness or proximity in time to the death of Deanne Drach.

Defendant further asserts that the trial court committed reversible error in allowing the State's various witnesses to testify concerning any statements that the decedent Deanne Drach allegedly made prior to her death as such statements constituted a violation of the confrontation clause of the United States Constitution.

In the article by Prater and Klemme quoted earlier, they point out that *Ohio v. Roberts*, 448 U.S. 56, 65 L. Ed. 597, 107 S. Ct 2531 (1980) sets forth a two-prong test necessary to satisfy the confrontation clause; unavailability and reliability. The latter is totally lacking in foundation and fact in the instant case. It should be further observed that the hearsay statement is not grounded in a "firmly rooted hearsay exception." *White v. Illinois*, 502 U.S. 3246, 112 S. Ct. 736 (1992) details" firmly rooted exceptions to hearsay" *res gestae* is not among those recognized in the federal courts. The Kansas legislature chose not to include it as an exception in the Code of Evidence. At least one member of this court has recognized that *res gestae* is no longer a part of the law of evidence in Kansas. See SIX, concurring in *State v. Edwards*, 264 Kan. 177, 955 P.2d 1276. Judge Gard and Prater and Klemmes believed *res gestae* was dead when this court decided *Jones*, *supra*. It is clear that *res gestae* has no firm rooting as an exception to the hearsay rule and the use as in this case constitutes a violation of the constitutional right to confront and cross-examine the witnesses against the defendant. He lost the right to test the reliability of accusatory statements made by those with no knowledge of the truth of falsity of their hearsay utterances. This is the crux of lack of confrontation and a denial of a very basic constitutional framework of the criminal justice system. It may only be made right by granting the defendant's request for a new trial without such impediments.

CONCLUSION

The defendant, Roger Drach, deserved a fair trial. He did not get it. The evidence of suicide was overwhelming, but was overcome by the prejudicial effect of the errors complained of in this brief. Justice demands that the court right this wrong and grant the defendant a new trial.

Respectfully submitted,

By: /s/
Jack Focht, #5679

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DEFENDANT-APPELLANT

No. 06-789

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In The

Supreme Court of the United States

ROGER DRACH,

Petitioner,

v.

LOUIS BRUCE and THE STATE OF KANSAS,

Respondents.

On Petition For Writ Of *Certiorari* To The Supreme Court Of Kansas

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ARGUMENT

As to whether *Crawford v. Washington*, 541 U.S. 36 (2004), ought to be applied retroactively to cases on collateral review, Petitioner Roger Drach agrees with the respondents that on this question the Court should hold his petition pending the Court's forthcoming decision in *Wharton v. Bockting*, 126 S. Ct. 2017 (2006), just as it has for the petitions pending in *New Mexico v. Forbes*, Case No. 05-644 (U.S. filed Nov. 17, 2005), and *Lave v. Quarterman*, Case No. 05-11552 (U.S. filed June 16, 2006).

Whether Kansas's unique, extra-statutory "marital discord" hearsay exception violates the Confrontation Clause, however, clearly is a question that merits this Court's writ of *certiorari* without awaiting a pending decision. The respondents premise their argument on the assertion that a decision "in this case has no future implications and would only apply to a fleeting number of *past* Kansas cases given the Court's decision in *Crawford*, which altered the Confrontation Clause analysis in the context of hearsay evidence rules" (Respondents' Brief in Opposition 6). While the respondents are correct that the marital discord exception will not be used in Kansas in the future, that fact has nothing to do with this Court's decision in *Crawford*, and it should not operate to prevent this Court from granting its writ of *certiorari* over this question.

In *Crawford*, this Court expressly held that its alteration of Confrontation Clause analysis in that case only applied to testimonial hearsay, such as is at issue in Mr. Drach's case. 541 U.S. at 62. Recently, this Court reaffirmed that its holding in *Crawford* only applies to testimonial hearsay. *Davis v. Washington*, 126 S. Ct. 2266,

2273 (2006). Therefore, the two-part *Roberts* test – whether the hearsay was admitted under a "firmly rooted" exception or whether it bears "particularized guarantees of trustworthiness" – endures when the admission of non-testimonial hearsay is at issue. *See Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

Accordingly, even post-*Crawford*, Kansas courts continued to admit hearsay under the "marital discord" exception in marital homicide cases. In *State v. Patton*, 120 P.3d 760 (Kan. 2005), decided nearly a year after this court handed down its decision in *Crawford*, the Supreme Court of Kansas employed the marital discord exception to uphold the admission of hearsay testimony that the defendant and his wife had marital difficulties in order to show that the defendant had murdered his wife for financial gain. *Id.* at 780. Although the defendant had argued that the admission of hearsay under the marital discord exception violated the Confrontation Clause, the Kansas court did not even refer to any decision of this Court – including *Crawford* – in rendering its decision otherwise. *Id.*

In October of 2006, however, only four months after the Supreme Court of Kansas rendered its decision in the case at bar, it finally struck down the marital discord exception to the hearsay rule. *State v. Gunby*, 144 P.3d 647, 658 (Kan. 2006). In *Gunby*, the Kansas court ruled that all "ways around application of and safeguards attendant to" Kansas's statutory hearsay rule regarding "other crimes and civil wrongs," K.S.A. § 60-455, "must be abandoned, not only because they lack reliable precedent but because they were never necessary in the first place." *Id.* at 659. This – and only this – put an end to Kansas's history of unconstitutionally admitting hearsay testimony

in marital homicide cases under the marital discord exception: the Kansas court realized the unreasonableness of the exception it had created forty years earlier. That same unreasonable and unconstitutional exception, however, remains the sole justification for the admission of the only evidence which tipped the scales in Mr. Drach's trial in favor of the prosecution. This Court should not let such an injustice stand.

Thus, Mr. Drach lingers as the vestigial victim of a Kansas legal regimen so unreasonable that even the body which created it now has discarded it. Does this, as the respondents argue, mean that this question, which is Mr. Drach's last possible claim against the admission of the hearsay testimony, "does not merit this court's review" (Respondents' Br. 5)? Hardly.

Chief Justice Rehnquist once noted, "there are really only three factors comprised in the *certiorari* decision -- conflict with other courts, general importance, and perception that the decision is wrong in the light of Supreme Court Precedent." Rehnquist, THE SUPREME COURT – HOW IT WAS, HOW IT IS 266 (1987). *See also* Supreme Court Rule 10(c) (*certiorari* review is justified when "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). Mr. Drach is not asking this Court to grant its writ of *certiorari* to answer a question of "general importance" or address a conflict among states or federal circuits. Rather, review is warranted because the decision of the Supreme Court of Kansas upholding the admission of hearsay testimony under its unique marital discord exception clearly conflicts with this Court's decisions regarding the admission of hearsay testimony and state law exceptions

to the hearsay rule in *Roberts*, *Idaho v. Wright*, 497 U.S. 805 (1990), *White v. Illinois*, 502 U.S. 346 (1991), and *Lilly v. Virginia*, 527 U.S. 116 (1999), as set out in detail in Mr. Drach's petition (Petition 14-22).

In the Supreme Court of Kansas, Mr. Drach argued that the admission of hearsay under the marital discord exception was unconstitutional in light of these very relevant decisions, all of which concerned state exceptions to the hearsay rule. The Kansas court held otherwise. The resulting conflict between the decision of the Kansas court and the relevant decisions of this Court is undeniable. The respondents do not suggest otherwise, nor have they ever done so at any stage of the proceedings below. This unabashed conflict, analogous to the questions presented in *Wright*, *White*, and *Lilly*, justifies *certiorari*. Those cases establish the boundaries of the Confrontation Clause. They do not permit states to admit hearsay erroneously under exceptions which fall outside those boundaries. Mr. Drach suffers from just such an unconstitutional error.

Additionally, *res judicata* does not operate in this case to serve as "an independent and adequate state law ground," as the respondents argue (Respondents' Br. 2). The respondents are correct that *res judicata* customarily does operate as an independent and adequate state law ground. Where that state law ground is premised on a holding of this Court, however, it no longer serves as a function of state law, but rather presents a federal question (Petition 23-24). Here, Kansas adopted its doctrine of *res judicata* from the decision of this Court in *Teague v. Lane*, 489 U.S. 288, 297 (1989). *See State v. Neer*, 795 P.2d 362, 366 (Kan. 1990). The respondents do not argue otherwise. Therefore, whether the Kansas court correctly

applied this Court's own doctrine of *res judicata* is within this Court's *certiorari* jurisdiction to review.

Nonetheless, Mr. Drach also has argued that even if *res judicata* does operate as a ground of state law in this case, its application is unsupportable (Petition 24-26). The respondents agree that in the rare case where an erroneous application of state law "rises to the level of a denial of a Constitutional right," the non-federal ground will not qualify as an independent and adequate ground of state law so as to defeat this Court's *certiorari* jurisdiction (Respondents' Br. 3 n.1). Using this doctrine, which Mr. Drach has detailed in his petition, this Court has rejected otherwise independent and adequate grounds of state law, including *res judicata* itself. *See Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476-477 (1918).

Such cases are rare because this Court "cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question." *Gryger v. Burke*, 334 U.S. 728, 731 (1948). Mr. Drach, however, does not ask this Court to review merely an erroneous decision by a state court on state law as a denial of due process under the Fourteenth Amendment. Whether the Supreme Court of Kansas erred in deciding that *res judicata* barred his claim against the unconstitutional marital discord exception is not a question presented in this case. This is because when this Court rejects a non-federal procedural ground for a decision below on a federal question as being "without any fair or substantial support," *Ward v. Bd. of County Comm'rs*, 253 U.S. 17, 22 (1920), it has jurisdiction to entertain the petitioner's federal claims not fully addressed on the merits below due to that unsupportable non-federal

ground. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 458 (1958).

Regardless of whether *res judicata* operates as a federal or non-federal ground in this case, its application is without any fair or substantial support. The respondents' argument otherwise muddles the procedural posture in the lower court. They suggest that the fact that Mr. Drach could not have raised the unconstitutionality of the marital discord exception on direct appeal is a "distinction without a difference" (Respondents' Br. 4 n.2). That is hardly the case. The application of *res judicata* is limited to those claims which could not have been made in the prior litigation. Mr. Drach could not have raised his Constitutional argument about the marital discord exception because the trial court admitted the hearsay under a *res gestae* exception. (In *Gunby*, in addition to ending the marital discord exception, the Supreme Court of Kansas also struck down the *res gestae* exception once and for all. 144 P.3d at 663. In the law of Kansas, there now remains no possible exception to the hearsay rule under which the testimony at issue in this case could have been admitted at trial. *See id.*) Mr. Drach's brief in his direct appeal, contained in the respondents' appendix, makes this eminently clear. That both the direct appeal and the case at bar concerned the constitutionality of admitting certain hearsay testimony under the Confrontation Clause is immaterial, as the direct appeal concerned a *res gestae* rationale and this case concerned Kansas's marital discord rationale. Clearly, a judgment that raising the unconstitutionality of the marital discord exception was *res judicata* cannot be supported.

The respondents argue that because "the lower court did not engage in the constitutional analysis requested" by

Mr. Drach, this Court lacks the necessary jurisdiction to review the question of whether the admission of hearsay testimony under the marital discord exception violated the Confrontation Clause (Respondents' Br. 2, 5). As indicated *ante*, however, when this Court rejects a state's non-federal ground for failing to render a decision on the merits of a federal question, that is not how this Court treats the underlying question.

In *NAACP*, the petitioner had argued federal Constitutional claims before the Supreme Court of Alabama. 357 U.S. at 451. The Alabama court, however, rejected the petitioner's arguments on the basis that the petitioner had sought the wrong state appellate remedy and held that it therefore "could not consider the constitutional issues." *Id.* at 454-455. After this Court granted its writ of *certiorari* and held that the Alabama court's application of its state procedural grounds was incorrect, it did not have to remand the case to the Supreme Court of Alabama for adjudication of the federal claims below. *Id.* at 458-459. Instead, the inadequate ground of state law was as if it never were. This Court was able to reach the petitioner's claims, even though the Alabama court had not actually reached a conclusion one way or another on the petitioner's Constitutional claims.

Similarly, here, where the Kansas court's application of *res judicata* clearly was unsupportable and served only to strip Mr. Drach of his Sixth Amendment right to confront the witnesses against him, the fact that the Kansas court did not render a decision on the merits of Mr. Drach's federal claim does not prevent this Court from reaching that claim. The Kansas court denied Mr. Drach's claims under the Confrontation Clause, creating a conflict with the relevant decisions of this Court. That it erroneously

applied *res judicata* to render that denial does not defeat this Court's *certiorari* jurisdiction to hear those claims.

CONCLUSION

For the foregoing reasons, and those stated in the petition, this Court should grant its writ of *certiorari* to review the decision of the Supreme Court of Kansas in this case.

Respectfully submitted,

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